

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY, NOVEMBER 14, 2006

+ + + + +

The Public Meeting convened in
Room 220 South, 441 4th Street, N.W.,
Washington, D.C., 20001, pursuant to notice at
9:30 a.m., Geoffrey H. Griffis, Chairperson,
presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice Chairperson
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

ANTHONY J. HOOD	Vice Chairperson
MICHAEL G. TURNBULL	Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLY BAILEY	Sr. Zoning Specialist
JOHN NYARKU	Zoning Specialist
ESTHER BUSHMAN, ESQ.	General Counsel

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D.C. OFFICE OF THE ATTORNEY GENERAL:

SHERRY GLAZER, ESQ.
LORI MONROE, ESQ.

This transcript constitutes the
minutes from the Public Meeting held on
November 14, 2006.

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1 P-R-O-C-E-E-D-I-N-G-S

2 11:09 a.m.

3 CHAIRPERSON GRIFFIS: Good

4 morning, ladies and gentlemen. Let me call to
5 order our Public Meeting of the 14th of
6 November 2006. I appreciate everyone's
7 patience with us as we have been getting ready
8 to commence with this meeting.

9 Copies of today's meeting agenda
10 are available for you. I'm sure you had
11 plenty of time to take a look at those. Let
12 me run through this very quickly and just
13 reiterate several important items.

14 First of all, we would ask that
15 everyone, please, turn off their cell phones
16 or noise transmitting devices, so that we
17 don't disrupt the transmission of these
18 proceedings and these proceedings are being
19 transmitted in two forms. The most important
20 of which we have been attentive to today is
21 the Court Reporter sitting on the floor to my
22 right. They are creating the official

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1 transcript of all of our proceedings today.
2 We are also being broadcast live on the Office
3 of Zoning's website.

4 Attendant to each of those,
5 however, for Public Meetings, there is not an
6 opportunity for the public to address the
7 Board. This is a time in which we will call
8 the cases we have already proceeded through.
9 The record is closed, complete and the Board
10 will begin its deliberations on it.

11 A few specific items. I am going
12 to be juggling a little bit the schedule of
13 our cases, but we are going to quickly get
14 through all of these. We do have scheduling
15 issues for Zoning Commissioners and others.
16 So let me say, first of all, a very good
17 morning.

18 I am Geoff Griffis, of course, the
19 Chairperson. Joining me is Ms. Miller, the
20 Vice Chair, representing the National Capital
21 Planning Commission is Mr. Mann and
22 representing the Zoning Commission on several

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1 of our cases this morning is Mr. Turnbull.
2 Ms. Bailey and Mr. Moy are with us from the
3 Office of Zoning.

4 Mr. Moy, I'm going to ask if we
5 could proceed and call the first case for
6 decision this morning? I would like to call
7 17519 first. That would be the Appeal of the
8 ANC-2E. For those in the audience, I will
9 then resume our agenda chronology and begin at
10 the beginning and get up into the end.

11 That being said, Mr. Moy?

12 MR. MOY: Yes, sir, good morning,
13 Mr. Chairman, Members of the Board. That case
14 as you said, is Appeal No. 17519 of the
15 Advisory Neighborhood Commission 2E, pursuant
16 to 11 DCMR 3101, from the administrative
17 decision of the Zoning Administrator,
18 Department of Consumer and Regulatory Affairs
19 to issue Building Permit No. 89770, allowing
20 conversion of an existing single-family semi-
21 detached dwelling into a row dwelling.

22 The appellant alleges that

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1 issuance of the permit violated the lot
2 occupancy provisions, section 403, of the
3 Zoning Regulations and that the Zoning
4 Administrator should have required Board of
5 Zoning Adjustment approval for the conversion.
6 The subject property is located in the R-3
7 District at premises 1812 35th Street, N.W.,
8 that's in Square 1296, Lot 802.

9 On October 17, 2006, the Board
10 completed public testimony, closed the record
11 and scheduled its decision on November 14,
12 2006. The Board requested posthearing
13 documents, primarily the proposed findings of
14 fact and conclusions of law. Mr. Chairman,
15 these have been received into the record. One
16 from the appellants on November 1st and is
17 identified in your case folders as Exhibit 21.

18 We also have the draft order from
19 the property owner, the intervenor and that is
20 identified as Exhibit 22. We also have from,
21 Mr. Chairman, the appellants again dated
22 November 7th, which my understanding is they

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1 filed in response to the property owner's
2 submission, and that's identified as Exhibit
3 24 and I'll come back to that in a moment.

4 As a preliminary matter, we have
5 received a filing from Richard and Margaret
6 Schmidt, represented by Nixon Peabody LLP,
7 that's identified in your case folder as
8 Exhibit 23. That would be a preliminary
9 matter. It's a filing that the Board did not
10 request. And, of course, in response to that
11 filing, we have a response from Holland and
12 Knight, who represent the property owner, and
13 that is identified in your case folders as
14 Exhibit 25.

15 Of course, in that exhibit,
16 Exhibit 25, it's a motion to strike Exhibit
17 23, but also there are issues related to the
18 filing from the appellant under Exhibit 24.
19 And lastly, Mr. Chairman, the Board should act
20 on the motion of the property owner to dismiss
21 the appeal. And I'll leave it at that.

22 CHAIRPERSON GRIFFIS: Thank you

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1 very much, Mr. Moy. Let's do begin with the
2 preliminary matters on this. We do have, I
3 believe it appropriate, to take up the motion
4 to strike first and the submissions that came
5 in. I'll open it up for Board Members'
6 discussion.

7 VICE CHAIR MILLER: Mr. Chairman,
8 it did seem that the filing did come in that
9 went beyond the schedule that you gave and I
10 think the question is whether or not we could
11 waive our rules to accept it. The appellant
12 characterized the pleading as falling within
13 3121.6 as response to a legal brief after the
14 close of a hearing.

15 And in looking at that, I think
16 that it is a response to legal arguments and
17 as opposed to new evidence coming in. I think
18 that makes a difference. And I think the
19 question would be whether or not there would
20 be good cause to accept it and whether or not
21 it would be prejudicial to the property owner
22 if we accepted it.

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1 And the property owner moved to
2 strike, but didn't identify any prejudice that
3 would be forthcoming as a result of our
4 keeping it in the record. And I don't really
5 see the prejudice. I think it's just more
6 legal argument and I leave it at that. I
7 think that -- I don't see a reason to really
8 strike it at this point.

9 My only other comment on that is
10 there was a letter attached to it on behalf of
11 Mr. Schmidt, who we did not give party status
12 to, and that seem almost in the nature of a
13 motion for reconsideration. And I don't think
14 that that would be appropriate at this point.
15 But I would note that it's not inappropriate
16 for us to reassert the reasons for which we
17 denied party status in this case.

18 And that we looked at Regulation
19 3112.15, which says, "In its discretion for
20 good cause shown whoever has a specific right
21 or interest that will be affected by action on
22 the appeal to intervene in the appeal for such

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1 general and limited purposes, the Board may
2 specify."

3 And we found that Mr. Schmidt
4 really could participate in the hearing with
5 the ANC and didn't show any particular way in
6 which he was going to contribute to the
7 proceeding differently and that was the
8 rationale. And it was said that we did cite
9 ZC Code that supported that and in this
10 filing, the appellant actually or Mr.
11 Schmidt's attorney actually put forward the
12 case that stood for our proposition that even
13 if we denied party status in this proceeding,
14 that that does not mean that that person would
15 not have standing to appeal the case to court.

16 And that was the York case that
17 was cited in those pleadings. So that's
18 actually in accordance with our reasoning.

19 CHAIRPERSON GRIFFIS: Others? Do
20 you have an opinion on the fact of the
21 standing of which this would be accepted or is
22 this just additional reiteration of the

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1 participants' testimony in the case?

2 VICE CHAIR MILLER: I think it's
3 acceptable because it's attached to the ANC
4 filing and the ANC is a party to the case and
5 it didn't come in separately from a non-party.
6 So whatever arguments that are in there that
7 are legal arguments that address the issues
8 that we left the record open for, which
9 actually did blur into our conclusions of law
10 that we were requesting, should be considered
11 by us.

12 CHAIRPERSON GRIFFIS: Okay.
13 Others? Is there any objection to waiving our
14 time regulations and opening the record and
15 taking this into the record?

16 BOARD MEMBER MANN: No.

17 CHAIRPERSON GRIFFIS: Very well.
18 We'll take it as a consensus of the Board then
19 and accept this into the record this November
20 6 dated filing and also that of the opposition
21 and motions to strike. Let's move ahead then
22 to the substance of this.

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1 VICE CHAIR MILLER: Are you moving
2 into the motion to dismiss?

3 CHAIRPERSON GRIFFIS: Yes.

4 VICE CHAIR MILLER: Okay.

5 CHAIRPERSON GRIFFIS: Would you
6 like to proceed?

7 VICE CHAIR MILLER: Okay. The
8 motion to dismiss request that we strike
9 arguments related to legal theories that
10 weren't asserted when the appeal was filed and
11 I would suggest that we deny the motion to
12 dismiss, that we visited this issue in the
13 Snow and Marsh decision in which we said that
14 the jurisdiction -- timeliness is
15 jurisdictional.

16 But the timeliness goes to
17 appealing a specific permit or decision. It
18 doesn't go to articulating all the legal
19 theories that might arise out of that appeal
20 if it's a permit or decision. The property
21 owner cited the Woodley Park case, but that
22 did involve different permits. And the court

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1 found that the original permit relating to
2 such issues as height, setback, use were late,
3 because they were known to the appellants in
4 that case a year earlier, whereas, there was
5 a revised permit, a specific permit that came
6 out later as to parking and that was
7 considered timely.

8 The rationale here really is that
9 an owner needs to be put on notice about a
10 specific decision or permit that there is a
11 cloud on it. But we have said many times that
12 in encouraging the community to come in as
13 soon as they know that there is a problem with
14 a permit or a decision to come in and we don't
15 expect them to have articulated every single
16 legal theory.

17 And also, when we look at these
18 appeal cases, we often look at different
19 theories ourselves to see what applies. So
20 jurisdiction doesn't apply to a legal theory.
21 It just applies to appealing the specific
22 permit or decision.

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1 CHAIRPERSON GRIFFIS: Very well.
2 Do you take the position of making a motion
3 then to deny the motion to dismiss?

4 VICE CHAIR MILLER: Yes, I would
5 move to deny the motion.

6 CHAIRPERSON GRIFFIS: Is there a
7 second?

8 BOARD MEMBER MANN: Second.

9 CHAIRPERSON GRIFFIS: Thank you.
10 For the discussion, comments, deliberation?
11 Very well.

12 We have a motion before us. It
13 has been seconded. I would ask for all those
14 in favor to signify by saying aye.

15 ALL: Aye.

16 CHAIRPERSON GRIFFIS: And opposed?
17 Why don't we record the vote.

18 MR. MOY: Yes, sir. The staff
19 would record the vote as 4-0-1. This is on
20 the motion of Ms. Miller, the Vice Chair, to
21 deny the motion to dismiss, seconded by Mr.
22 Mann. Also in support of the motion Mr.

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1 Griffis and Mr. Turnbull. We have Mr. Etherly
2 not present, not voting.

3 CHAIRPERSON GRIFFIS: Thank you.
4 Let's move ahead then. I'm going to dispense
5 with the preliminary matters. I think we need
6 to move into the substance of the appeal
7 itself. I think we are all very well-aware
8 the history of this and what we have before
9 us. Fundamentally, we're looking at the
10 provisions of the section of the side yards,
11 specifically 405.3 and 405.8 have been
12 discussed and addressed in this application.

13 I know there will be numerous
14 elements and aspects of discussion and I won't
15 be comprehensive in it, but, clearly, we're
16 here to figure out whether the granting of
17 this permit was in any way an error by the
18 Zoning Administrator's review.

19 Of issue, an element is whether
20 this was a matter-of-right conversion of an
21 existing structure into a row dwelling. We
22 look at the provisions of that and then, if as

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1 proposed, does it meet all the criterium of
2 which a matter-of-right row dwelling is
3 defined?

4 I'm going to open it up a little
5 very quickly to get everyone's response on
6 this and then we can go further in detail as
7 we need to. This is not an unknown topic to
8 this Board. It has numerous decisions on this
9 specific, what, element of side yards, but
10 also in terms of construction of structures as
11 row dwellings, whether they attach or not, the
12 provision of what's happening next door or
13 what isn't.

14 I think the pervasive discussion
15 on this -- well, there it is. Actually, I
16 think I'm going to open it up for beginning
17 discussion, deliberation on this. And I will
18 join in, as is required, if anyone would like
19 to avail themselves to open up discussions.

20 VICE CHAIR MILLER: Mr. Chairman,
21 there were several theories that were
22 presented to us as to why or why not this was

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1 a matter-of-right conversion. I think what's
2 persuasive to me is that I think there's a
3 difference between what's allowed as a matter-
4 of-right and what is allowed as a conversion.

5 And looking at all the different
6 theories that were presented, I look at 405.8,
7 which says "In the case of a building existing
8 on or before May 12, 1958 with a side yard
9 less than 8 feet wide, an extension or
10 addition may be made to the building, provided
11 that the width of the existing side yard shall
12 not be decreased and provide further that the
13 width of the existing side yard shall be a
14 minimum of 5 feet."

15 In this case, the matter-of-right
16 conversion was attempted to be accomplished by
17 eliminating the side yard altogether. And one
18 issue is whether or not elimination is the
19 same or falls within the meaning of decreased.
20 And I would say that it does in my looking at
21 this regulation and it makes sense that it
22 would, because I think that part of the

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1 purpose of this regulation is to deal with an
2 existing building in that it's different than
3 putting a new building in a spot.

4 The Zoning Commission specifically
5 amended the regulations later to insert this
6 regulation related to these particular types
7 of buildings and I think we have to look at
8 the specific over the general here. And in
9 looking at the testimony that was presented
10 about the problems that were created by
11 extending this and eliminating the side yard
12 on the existing neighbor, it makes sense that
13 this would cover elimination as well.

14 But I'll open it up for more
15 people to respond.

16 CHAIRPERSON GRIFFIS: Excellent.
17 I think that's an excellent point to start.
18 And I would note for the record my difficulty
19 in beginning deliberation on this case for
20 numerous reasons. And I think it's similar to
21 the other cases, but specific to this one.
22 And that is the provisions of the section of

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1 405.3 and 405.8 are so inarticulate as to what
2 their intent is, but also in terms of their
3 actual implementation, that I have no
4 difficulty believing that the Zoning
5 Administrator might have difficulty in making
6 a logical bright-line decision on this.

7 And I think having it before us it
8 has the same difficulties. And I would also
9 say for the record that I see I have great
10 concerns for this specific project if it was
11 to move forward and was found to be matter-of-
12 right. However, I also understand that in an
13 appeal situation, we're looking at how
14 regulations are actually interpreted.

15 And, therefore, it is unlike a
16 variance or special exception of which it's
17 decided solely on the specific facts base in
18 that case. An appeal goes through a broader
19 responsibility and that is how actually the
20 regulations will be implemented based on our
21 interpretation of them.

22 Our legislative history, our order

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1 of history shows that we have had conflicting
2 understandings of this. They are not 100
3 percent in conflict, but it certainly shows
4 that 405.3, and in addition perhaps 405.8, are
5 difficult sections to really have implemented.

6 So I say that for many reasons,
7 but one important one is to certainly
8 encourage the Zoning Commission to take a look
9 at that provision. And 405.3 reads, you know,
10 "In R-2, R-3, R-4, R-5, a one-family dwelling
11 flat or multiple dwelling as erected that does
12 not share a common division wall with the
13 existing building or a building being
14 constructed together with a new building, it
15 shall have a side yard on each resulting free-
16 standing side."

17 That, to me, fundamentally is a
18 difficult section, because, one, if you read
19 it in one sense, it requires that you control
20 a site next to your's, the adjacent site,
21 which is not always, and certainly I would say
22 in the majority of cases, the reality.

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1 So for instance, if you had three
2 row dwelling lots each empty and you
3 controlled and had site control of the center
4 one, what it says to me if you read it in one
5 direction is that you would have to make sure
6 that your neighbors were building at the same
7 time, so that you could attach to their wall.

8 I do believe that we have
9 established and I think fundamentally
10 correctly the fact of whether a lot line wall,
11 face on line wall or a common division wall
12 are similar in nature in reading 405.3. And
13 I agree that they are.

14 Then we need to get into the
15 specific elements of this case. Is a
16 conversion to a row dwelling allowed?
17 Fundamentally, is it allowed in this district?
18 And I think we have also been definitive in
19 the fact that yes, it is. We cannot go and
20 there is nothing in the provision or the
21 reading of the regulations that I see where in
22 R-3 a row dwelling is not allowed, generally

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1 speaking, as a matter-of-right structure and
2 use.

3 So then we go into this reading
4 again of 405.3. And I find difficulty in
5 reading it as you have begun to address as the
6 one is not able to eliminate a nonconforming
7 side yard, based on the operative reading of
8 the word "reduce." Go ahead, do you want to
9 say something?

10 VICE CHAIR MILLER: Okay. Well, I
11 want to bring also the Board's attention to
12 223, which says "An addition to a one-family
13 dwelling or flat," which this is, "in those
14 residence districts where a flat is permitted,
15 that does not comply with all of the
16 applicable area requirements of 401, 403, 404,
17 405, 406 and 2001.3, shall be permitted as a
18 special exception if approved by the Board of
19 Zoning Adjustment."

20 Okay. Basically, we had here a
21 semi-detached house that did not comply with
22 section 405. And the way I read it, it was an

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1 addition that they wanted to make and,
2 therefore, they needed to come to the Board
3 for a special exception under 223.1, whether
4 or not it decreased to zero or not. They were
5 doing an addition to this dwelling that did
6 not comply with 405, which is different from
7 a new dwelling that is being built as a row
8 house as a matter-of-right.

9 CHAIRPERSON GRIFFIS: However, I
10 understand what you're saying and reading just
11 specifically 223, that renders some logic if
12 you agree with your reading of 405.3.
13 However, in 223, you have to read 2001.3
14 first, do you not? Because 2001 of
15 nonconforming structures devoted to conforming
16 uses allows enlargements, additions to
17 structures provided that your lot occupancy is
18 met.

19 So it says "Although you may be
20 nonconforming," so for instance, your reading
21 is that it's a nonconforming side yard.
22 2001.3 allows you to enlarge it even if you

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1 have a nonconforming side yard, as long as you
2 meet the lot occupancy requirements.

3 VICE CHAIR MILLER: Which they
4 didn't in this case.

5 CHAIRPERSON GRIFFIS: No, they
6 did.

7 VICE CHAIR MILLER: Not
8 originally. In their special exception, they
9 came to the Board for special exceptions
10 because of the side yard and because of the
11 lot occupancy.

12 CHAIRPERSON GRIFFIS: Is that the
13 case? That's not my recollection. My
14 recollection was they met the lot occupancy
15 requirements. I believe it was around 31
16 percent lot occupancy for the semi-detached.

17 VICE CHAIR MILLER: I'll pull the
18 case.

19 CHAIRPERSON GRIFFIS: Okay.

20 (Whereupon, at 11:33 a.m. a recess
21 until 11:34 a.m.)

22 CHAIRPERSON GRIFFIS: So the

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1 existing lot occupancy was 26.5 percent.
2 There was a special exception that was brought
3 to us for the lot occupancy relief and special
4 exception under 403, which, according to their
5 files, would have made it, approximately,
6 43.75 percent, which would have been a special
7 exception going beyond the R-3, all of the
8 structures 40 percent requirement, I suppose,
9 not getting totally into the details of that
10 last case, but trying to figure out the
11 details of the calculations for the existing
12 conditions here.

13 So again, I would go to the point
14 of does it meet the lot occupancy requirements
15 in order to make additions to a nonconforming
16 structure with a conforming use under 2001.3?
17 So I would have to look at my reading and if
18 I'm following your logic, my reading would be
19 it would be allowable even with a
20 nonconforming side yard, even with your
21 reading of 405.8 or 405.3, I think is what you
22 are saying.

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1 VICE CHAIR MILLER: 8.

2 CHAIRPERSON GRIFFIS: Oh, it's 8.

3 VICE CHAIR MILLER: 8, yes.

4 CHAIRPERSON GRIFFIS: Okay. It
5 still would meet the lot occupancy
6 requirement, which would allow it to proceed
7 as a matter-of-right under 2001.3. Unless I'm
8 not seeing it.

9 VICE CHAIR MILLER: Could you just
10 clarify for me that you are talking about the
11 lot occupancy requirement for a semi-detached
12 or for a row dwelling?

13 CHAIRPERSON GRIFFIS: Well, I'll
14 read them all to you. In the R-3, no, it's
15 just two. It's either 60 percent or it's 40
16 percent. In the R-3 all of the structures is
17 40 percent. In a row dwelling, church or
18 public school is 60 percent.

19 VICE CHAIR MILLER: I know that,
20 but I'm just wondering you were concluding
21 that they met the requirements. What
22 requirements would they have met?

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1 CHAIRPERSON GRIFFIS: Well, if I
2 was following your logic, you were saying
3 well, clearly, that's a special exception
4 requirement under 223, because they are making
5 an addition to a nonconforming structure. And
6 you mentioned that they were nonconforming to
7 lot occupancy, which I think we have dispensed
8 with.

9 But if they were nonconforming to
10 the side yard, which I thought was more
11 detailed to where you were going, because of
12 your reading of the provisions in 405, right?

13 VICE CHAIR MILLER: Right.

14 CHAIRPERSON GRIFFIS: Your
15 provisions in 405, which -- right. 405.8,
16 which would go to the side yard shall not be
17 decreased. If I just agreed with you for
18 point of argument here that it was a decrease
19 that they were -- that that addition was going
20 to decrease that side yard, would it require
21 a special exception?

22 And I would say that in my reading

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1 of the regulations it does not, because in
2 2001.3 you are allowed for nonconforming
3 structures, because it would be a
4 nonconformity of a side yard there, that you
5 would be allowed to put an addition on,
6 because they meet the lot occupancy
7 requirements.

8 Even though under 223 the special
9 exception covers those elements that don't
10 meet all the requirements of side yard and
11 other provisions in the R Districts.

12 As you mull that one over, I think
13 the other operative element of legal argument
14 that you are asserting is is the reading of
15 405.8, the decrease, is that the same as what
16 is being proposed here, which is the removal
17 of it? And I think we need to discuss
18 whether, in fact, that is a proper reading of
19 405.8.

20 Because one could assert that the
21 legal tenor of the regulations is to, one,
22 assure that there is a conforming structure

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1 built and, two, that any nonconformities would
2 be cured. So could not one argue the fact
3 that if you have a nonconforming side yard, if
4 you were able to in accordance with the
5 regulations, remove that side yard, how could
6 we then go to a section of the regulations
7 that assert that you cannot decrease that to
8 remove a nonconformity, because that would be
9 a nonconformity?

10 Simply put, isn't the regulations
11 always pushing us to cure nonconforming and
12 doesn't the removal or isn't a removal
13 different than a decrease?

14 VICE CHAIR MILLER: I don't think
15 a removal is always different from a decrease.
16 I think that this specific provision's
17 rationale -- I don't know if it's eliminated
18 just by the fact that there is an elimination
19 instead of a decrease. I think we have seen
20 in this case that there are problems resulting
21 from an interpretation of the regulation that
22 way and that's something to consider in our

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1 determination as to how we interpret the
2 regulations.

3 CHAIRPERSON GRIFFIS: Okay. Mr.
4 Turnbull?

5 COMMISSIONER TURNBULL: Thank you,
6 Mr. Chairman.

7 CHAIRPERSON GRIFFIS: Sure.

8 COMMISSIONER TURNBULL: I guess
9 what's a little bit confusing in all this and
10 I think Ms. Miller has touched on it is that
11 in 405.8, there is definitely a requirement
12 there, but not decreasing the side yards. I
13 mean, if you had a vacant lot and you were
14 going to -- you were allowed to then put up a
15 row dwelling as you were saying earlier, there
16 is that flexibility to do that within this
17 area the way it is zoned.

18 But with an existing building, is
19 the removal of that side yard, as you said,
20 trying to cure it or is it simply
21 circumventing it to the fact that it's pushing
22 us to do something that was maybe not intended

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1 by 405.8? It's pushing us to go to a point
2 where maybe we really shouldn't be going.

3 That by totally removing it and
4 causing, making the cure, it's pushing us to
5 interpret this in an extreme way that goes
6 beyond maybe what the intent is. And I would
7 agree with Ms. Miller that maybe that it's, to
8 me, circumventing it in one way by forcing us
9 to look at this in another light and
10 supposedly trying to cure the problem that's
11 there. But I don't know whether it is up to
12 us to make that cure.

13 CHAIRPERSON GRIFFIS: Yes.

14 COMMISSIONER TURNBULL: Is what
15 I'm getting at.

16 CHAIRPERSON GRIFFIS: Yes. I
17 understand your point.

18 BOARD MEMBER MANN: Mr. Chairman?

19 CHAIRPERSON GRIFFIS: Yes?

20 BOARD MEMBER MANN: One of the
21 things that I'm curious about that you just
22 said that I perhaps don't know enough

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1 background about is that you said the
2 regulations are always pushing us to decrease
3 the nonconformity?

4 CHAIRPERSON GRIFFIS: No, to
5 remove.

6 BOARD MEMBER MANN: To remove the
7 nonconformity. Where do we know or how do we
8 know that the regulations are always pushing
9 us to remove a nonconformity?

10 CHAIRPERSON GRIFFIS: It's an
11 excellent question. Well, we can start
12 generally. First of all, the regulations lay
13 out things that need to be followed and then
14 in each of those we give provisions of which
15 that you can find relief from those. And then
16 the other aspect is there is a general
17 provision in here and in the miscellaneous
18 chapter that goes directly to the fact of the
19 intent of the regulations to cure
20 nonconformities.

21 And even reading, I would say,
22 Chapter 20 that utilizes nonconforming uses in

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1 structures and in our parking calculations,
2 there are specific sections that deal with
3 specific elements that are nonconforming and
4 how we move them towards conforming elements.

5 The other, if you look at it in a
6 general sense, because that's what we're
7 discussing here, it's in reverse where the
8 regulations preclude you from removing a
9 nonconforming aspect. Certainly, all the
10 regulations would move you to creating
11 conforming buildings and structures.

12 For instance, here is the biggest
13 piece that we have in the regulations is alley
14 dwellings. Alley dwellings, it was very clear
15 that the regulations wrote out that they
16 wanted to cure that situation and they made
17 it, essentially, prohibited from having those
18 and there are steps of which there is a
19 removal of those. So that they are trying to
20 winnow away what they established as a
21 nonconforming structure and conforming use.

22 And in their provisions it says

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1 "In each time something happens, we want it to
2 be removed." The same thing with the
3 nonconforming use. If it lapses for a certain
4 period of time, being three years, it cannot
5 be reinstated. Because what are we trying to
6 do? We're trying to cure those elements that
7 are nonconforming in the regulations.

8 VICE CHAIR MILLER: I just want to
9 add that there are various goals and intents
10 and purposes in the regulations. And that,
11 you know, you can certainly look at 101 as
12 interpreting regs which says, 101.1 in their
13 interpretation and application, "The
14 provisions of this title shall be held to be
15 the minimum requirement adopted for the
16 promotion of the public health, safety,
17 morals, convenience, order, prosperity and
18 general welfare to: (A) Provide adequate light
19 and air."

20 So I think that certainly
21 providing adequate light and air is central to
22 a lot of our regulations. And in this case,

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1 providing for a special exception when a side
2 yard is decreased like this would be in
3 furtherance of that interpretation as set
4 forth in 101.

5 CHAIRPERSON GRIFFIS: All right.
6 But that's taking -- I'm not sure I follow,
7 because it seems like you are taking this into
8 a totally different direction. I'm not
9 arguing against the fact that yes, the
10 regulations in its interpretation and
11 application in generally 101 is to protect the
12 general welfare.

13 But we're talking about curing
14 nonconformities. I mean, go to 101.5 then.
15 "No building structure or premises shall be
16 used and no building structure or party of a
17 building or structure shall be constructed,
18 extended, moved, structurally altered or
19 enlarged, except in conformity with this
20 title."

21 It's talking about bringing
22 everything into conformity, even as you change

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1 it. So, yes, then we get to the basic element
2 of so what's conforming with the regulations?

3 VICE CHAIR MILLER: I don't think
4 -- I just don't think that's the be all and
5 end all of it.

6 CHAIRPERSON GRIFFIS: I tend to
7 agree.

8 VICE CHAIR MILLER: Conforming at
9 the expense of adverse impacts.

10 CHAIRPERSON GRIFFIS: I agree with
11 you there. But I'm just saying where we get
12 in then to the specifics, I don't see where
13 405.8 goes to prohibiting one from removing a
14 nonconforming aspect. It talks about
15 decreasing. But let's talk about 405.8,
16 because, first of all, in reading, Mr.
17 Turnbull brings up an interesting point of how
18 you read this and what it is asking us to do.

19 But 405.8 as opposed to 405.3,
20 let's say, 405.8 doesn't tie itself directly
21 to any other residential district. So,
22 therefore, it will be all of those, right? It

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1 talks about an extension or addition. It
2 seems to be trying to ensure that if you have
3 a side yard that may not be conforming,
4 because it was rendered nonconforming when our
5 regulations were adopted, right, in 1958,
6 which is why that's a critical date to have in
7 there, you have an existing condition.

8 It's nonconforming, based on our
9 Zoning Regulations, at this point. It's
10 saying look, we don't want to stop you from
11 adding on to that just because you have this
12 nonconformity. But what we want to make sure
13 is that if you have less than that 8 feet
14 required, that you don't reduce that 8 feet
15 side yard, because it's a pertinent part of as
16 it was laid out, as it was built, that
17 specific side yard.

18 But it's not tying itself to what
19 the side yard requirement is in each of the
20 zoned districts. It's just saying look, if
21 you have these, don't reduce it.

22 VICE CHAIR MILLER: I'm just not

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1 sure what the difference would be between
2 reducing it to 1 inch of the lot line and
3 reducing it to the lot line, as far as the
4 purpose of this.

5 CHAIRPERSON GRIFFIS: Excellent.
6 So that's a good point to bring up. 1 inch,
7 because 405.8 has to require 5 feet. It's
8 just talking in the parameters of,
9 essentially, in that element of 5 feet to 8
10 feet, right? Because this provision -- isn't
11 it directly tied and provided further the
12 width of the existing side yard shall be a
13 minimum of 5 feet?

14 It has to be 5 feet in order to be
15 read in 405.8. So it's talking about 5 to 8
16 feet. Because I think all of our regulations
17 talk to the point of we don't want a building
18 so close as is proposed. There is no
19 structure as defined. It's either a row
20 dwelling, which is on the property line, or
21 it's a semi-detached or a detached. And the
22 semi-detached and the detached have a side

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1 yard.

2 In that side yard provision, as I
3 read the regulations, the pertinent ones for
4 today, it's either 5 feet, 8 feet or zero.
5 That's the way I read that section. So one
6 would actually -- might even assert that 405.8
7 has really no relevancy to the review of this
8 if one was to fall on the reading of 405.8 as
9 not regulating the conversion or the building
10 of a row dwelling.

11 VICE CHAIR MILLER: We don't have
12 a building of a row dwelling though. We have
13 an existing semi-detached dwelling that is
14 doing an addition.

15 CHAIRPERSON GRIFFIS: But you have
16 a request for a permit for a row dwelling.
17 It's an addition to an existing semi-detached
18 converting it to a row dwelling. So it brings
19 up an interesting point of is the Zoning
20 Administrator required to look at the end
21 result in reviewing the permit? I mean, what
22 is being proposed and how it then follows and

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1 is inconforming with the regulations?

2 And that's what he or she is
3 charged with doing, right?

4 VICE CHAIR MILLER: Is he not
5 charged with looking at what's there? Because
6 this regulation starts with what's there in
7 the case of a building existing.

8 CHAIRPERSON GRIFFIS: Yes, I
9 absolutely agree. I'm with you there.

10 VICE CHAIR MILLER: Okay.

11 CHAIRPERSON GRIFFIS: So then
12 where is the error or I don't know, how are
13 you going to structure your argument? Where
14 is the error in the Zoning Administrator's
15 review of this permit? Be it in looking at
16 the existing condition or looking at the end
17 resulting condition.

18 VICE CHAIR MILLER: I think the
19 error is that he needed to look at 405.8,
20 because he had an existing -- a building that
21 was existing on it before May 12, 1958 with a
22 side yard less than 8 feet wide and with a

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1 proposal for an addition to that that would
2 decrease the side yard. And 405.8 says that
3 "It shall not be decreased," if there is not
4 going to be a minimum of 5 -- there has to be
5 a minimum of 5 feet.

6 Therefore, I think it brings it
7 back to 223. And that he should have sent it
8 to the Board for a special exception.

9 CHAIRPERSON GRIFFIS: Under 223?

10 VICE CHAIR MILLER: Yes, for
11 failure to comply with 405.8.

12 CHAIRPERSON GRIFFIS: Because they
13 didn't have a conforming side yard?

14 VICE CHAIR MILLER: Because it was
15 an addition that was decreasing the side yard.

16 CHAIRPERSON GRIFFIS: Okay. But
17 how do you read 2001.3 then?

18 VICE CHAIR MILLER: I'm not sure
19 2001.3 trumps 405.8.

20 CHAIRPERSON GRIFFIS: Really?
21 Perhaps we will think about that for a moment.

22 VICE CHAIR MILLER: Yes. Yes,

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1 405.8 is very specific.

2 CHAIRPERSON GRIFFIS: But it seems
3 to me you are getting to a level of process or
4 procedure, because you're not saying that
5 based on -- let me see if I understand what
6 you're saying. Are you saying that it's not
7 based on the fact that there is an existing
8 nonconforming side yard, but it's the action
9 taken that is requiring the review? I think
10 they are two different pieces.

11 VICE CHAIR MILLER: There was
12 under 405.8 a building existing with an
13 existing nonconforming side yard.

14 CHAIRPERSON GRIFFIS: Okay. So
15 the existing nonconforming side yard would
16 make it a nonconforming structure, agreed,
17 correct?

18 VICE CHAIR MILLER: Yes.

19 CHAIRPERSON GRIFFIS: And it's
20 devoted to a conforming use, that's
21 understood.

22 VICE CHAIR MILLER: Yes.

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1 CHAIRPERSON GRIFFIS: So I don't
2 see how 2001 -- "The restrictions set forth in
3 this section shall apply to nonconforming
4 structures devoted to a conforming use, except
5 as provided in 2001.11 and 2001.12, ordinary
6 repairs, alterations, modernizations,
7 structures including structural alterations
8 shall be permitted."

9 And then 2001.3 says "This
10 nonconforming structure enlargements or
11 additions may be made to the structure,
12 provided that the structure conforms with the
13 lot occupancy requirements and the addition or
14 enlargement itself shall conform to use and
15 structure requirements, neither increase or
16 extend an existing nonconforming aspect of a
17 structure or create any new nonconformity of
18 the structure and addition combined."

19 I like the flowery wording of all
20 those. It kind of makes sense, doesn't it?
21 So how are you not in 2001.3?

22 VICE CHAIR MILLER: Okay. I need

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1 to ponder that.

2 CHAIRPERSON GRIFFIS: Excellent.

3 VICE CHAIR MILLER: But I'm not
4 saying you're not in 2001.3.

5 CHAIRPERSON GRIFFIS: That's okay.

6 VICE CHAIR MILLER: I'm saying I'm
7 not sure whether that trumps totally 405.8.

8 CHAIRPERSON GRIFFIS: Understood.

9 VICE CHAIR MILLER: Okay.

10 CHAIRPERSON GRIFFIS: As we run by
11 that argument, because that's a great
12 substance of this and I believe Ms. Miller is
13 asserting that deliberative aspect of it,
14 let's bring up any others that might be of
15 occasion. I don't think we need to go back
16 to, although it was brought up in the case
17 presentation by the Zoning Administrator,
18 17310, which was the past appeal, if I
19 remember correctly the number, and the eave
20 overhang. I think that is fairly definitive
21 in what was happening.

22 However, there was also the

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1 special exception that was reviewed by the
2 Board for that structure. Now, I'm wondering
3 if there is any critical or pertinence to
4 that, in terms of stepping in the shoes of the
5 Zoning Administrator, how he or she should
6 have, he in this case, reviewed the permit
7 that was before him?

8 On closing, Ms. Brown, I think,
9 made incredibly articulate arguments on the
10 fact that the base building permit that was
11 appealed, it was upheld that there was an
12 error. However, there was no, I think in
13 pertinent point she said, direction from the
14 Board of how that was to be cured. And,
15 therefore, the Zoning Administrator took on
16 the aspect of let's look at remedy and the
17 owner brought forth a remedy and, therefore,
18 was able to modify the base building permit in
19 order for revision review.

20 That revision review, obviously is
21 not before us, was asserted and is asserted to
22 bring this all into conformity with the Zoning

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1 Regulations. So back to my question of is
2 there any pertinence to that element of
3 whether that was correct or not correct?
4 Clearly, that's very persuasive and there is
5 a lot of excitement getting behind that one.

6 VICE CHAIR MILLER: Well, I'm
7 sorry.

8 CHAIRPERSON GRIFFIS: That's all
9 right.

10 VICE CHAIR MILLER: This is the --

11 CHAIRPERSON GRIFFIS: That's
12 totally understandable.

13 VICE CHAIR MILLER: Just to fill
14 in the silence though, I was doing my
15 pondering. So I just want to respond back to
16 2001.3, how do we reconcile that with 405.8.

17 CHAIRPERSON GRIFFIS: Good.

18 VICE CHAIR MILLER: And you can
19 debate it in the same way, but I think that
20 2001.3(d)(2) says "Neither increase or extend
21 any existing nonconforming aspect of the
22 structure." And in this case, they were

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1 extending the nonconforming side yard or the
2 nonconforming aspect of this dwelling, which
3 was a side yard that was less than 5 feet and
4 they were increasing the nonconformity to the
5 point, I understand, of eliminating it
6 altogether.

7 But when we had the Brinckerhoff
8 case, we were talking about the difference
9 between how they are extended or not extended.
10 In that case, where the side yard -- when an
11 addition just went further to the back, the
12 side yard width remained the same and that was
13 considered not extending or increasing a
14 nonconformity.

15 CHAIRPERSON GRIFFIS: Right.

16 VICE CHAIR MILLER: In this case,
17 the side yard was being decreased to the side,
18 which was, in fact, if you were to decrease it
19 1 foot, you would say certainly you were
20 extending the nonconformity. So it's the same
21 rationale.

22 CHAIRPERSON GRIFFIS: I

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1 understand.

2 VICE CHAIR MILLER: That you are
3 extending it, even though you get to the point
4 of eliminating it.

5 CHAIRPERSON GRIFFIS: And I
6 appreciate that. However, I disagree with how
7 you read the regulations. Because what you
8 are doing, again, is what I said, but you are
9 reading the regulations in the operative words
10 and then looking at the process, not the end
11 result. And the regulations go to the end
12 result.

13 VICE CHAIR MILLER: I'm not sure
14 about that.

15 CHAIRPERSON GRIFFIS: So you're
16 not --

17 VICE CHAIR MILLER: 405.8 talks
18 about the process of extending or doing an
19 addition to an existing building. It is --

20 CHAIRPERSON GRIFFIS: That's
21 right.

22 VICE CHAIR MILLER: -- spoken in

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1 words of process.

2 CHAIRPERSON GRIFFIS: And when it
3 says "It shall not be decreased," it doesn't
4 mean that you are -- as each brick you add you
5 are decreasing. It means when you are
6 finished, when that wall is up and that's what
7 the regulations use there, there are permanent
8 aspect. You measure off of the line that is
9 then established.

10 So I don't see how you read 2001.3
11 that this is extending. This is extending a
12 nonconformity all the way to conformity. So
13 when does the regulation start to look at what
14 is or isn't conforming? It looks at it when
15 you are finished.

16 VICE CHAIR MILLER: I don't
17 totally disagree. I mean, I don't totally
18 agree in this case.

19 CHAIRPERSON GRIFFIS: Okay. In
20 this case?

21 VICE CHAIR MILLER: No, where you
22 have existing --

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1 CHAIRPERSON GRIFFIS: Okay.

2 VICE CHAIR MILLER: --
3 nonconforming dwellings. I think that the
4 regs are careful as to how they are allowed to
5 be changed. And so a lot of it is process.
6 It's not all end result.

7 CHAIRPERSON GRIFFIS: It is
8 result.

9 VICE CHAIR MILLER: Only because--

10 CHAIRPERSON GRIFFIS: It's not
11 means and methods. It's not constructability.
12 It's not materials in this case. It is where
13 does that wall fall? Does it fall on the
14 property line? An inch away from it or 5
15 inches away from it or 10 feet from it? And
16 when you're talking about decrease, it's not
17 talking about the process of which. It talks
18 about where it ends, where it lands.

19 VICE CHAIR MILLER: Okay. Well,
20 we're talking about conversion then, maybe
21 that's a little bit different. And what's the
22 impact of a conversion versus the impact of a

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1 new building? I think that they are
2 different.

3 CHAIRPERSON GRIFFIS: I don't
4 disagree.

5 VICE CHAIR MILLER: Yes.

6 CHAIRPERSON GRIFFIS: But I need
7 to see where the regulations point us to deal
8 with them differently.

9 VICE CHAIR MILLER: I think it
10 does here. It just says, you know, look at it
11 as a special exception to make sure there is
12 not an adverse impact. Not that you can't do
13 it.

14 CHAIRPERSON GRIFFIS: In 2001 or
15 223?

16 VICE CHAIR MILLER: 223.

17 CHAIRPERSON GRIFFIS: Okay.

18 COMMISSIONER TURNBULL: Mr.
19 Chairman?

20 CHAIRPERSON GRIFFIS: Yes?

21 COMMISSIONER TURNBULL: I wonder
22 if I could add something on to what some of

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1 the conversation you were just having? We
2 were talking about the Zoning Administrator
3 weighing in on or curing a problem. And I
4 guess what's troubling is that if you had an
5 existing building which was nonconforming,
6 that's one issue and you're trying to work
7 with it.

8 But in this case, you had an
9 existing nonconforming structure which had
10 been made more nonconforming by the applicant.
11 And I guess the question comes back when the
12 Zoning Administrator looks at a situation like
13 that, although this Board did not give a cure
14 when it upheld the appeal, that there was a
15 problem with the structure, would not the
16 Zoning Administrator be required to weigh in
17 more fully then on a structure such as that
18 before giving his version or blessing on the
19 cure?

20 I guess there is a question from
21 my standpoint of again notwithstanding you
22 have a nonconforming structure, it's been made

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1 more nonconforming by then having the Zoning
2 Administrator, sort of the judicial aspect,
3 now saying I'm going to decide the cure for
4 this. Is that not putting more authority on
5 him than what he probably should have, I
6 guess, in a situation like this?

7 I just throw that out there.

8 CHAIRPERSON GRIFFIS: Right.
9 That's an interesting point. Maybe in another
10 way, is he not responsible to address what the
11 Board has said in its proceeding? And we have
12 two different proceedings.

13 COMMISSIONER TURNBULL: Right.

14 CHAIRPERSON GRIFFIS: You're
15 talking about the appeal, but we also have a
16 special exception.

17 COMMISSIONER TURNBULL: And the
18 special exception, right.

19 CHAIRPERSON GRIFFIS: And was that
20 actually elements of the denial of that
21 special exception addressed in the Zoning
22 Administrator's review?

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1 COMMISSIONER TURNBULL: Yes.

2 CHAIRPERSON GRIFFIS: And would
3 they be required to be? It's an interesting
4 point.

5 COMMISSIONER TURNBULL: Yes.

6 CHAIRPERSON GRIFFIS: Others? I'm
7 not aware that I have ever seen anything or
8 been even close to being in a situation at
9 this point where we would have that
10 discussion. Fascinating element.

11 VICE CHAIR MILLER: I just want to
12 chime in as far as I'm not sure what to do
13 with this, but basically, yes, it was the case
14 where, you know, this Board found that it was
15 having -- the first addition was having an
16 adverse impact on the neighbor's light and air
17 and was out of character with the
18 neighborhood. And now we have the property
19 owner increasing those problems doing further
20 additions and putting himself in another
21 category where the 223 wouldn't apply.

22 CHAIRPERSON GRIFFIS: Okay. Other

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1 comments on that?

2 COMMISSIONER TURNBULL: I guess
3 just following up on notwithstanding the other
4 arguments to the code, 223 or 405.8, I guess,
5 I'm still bothered by the process issue on how
6 it all happened and that just drills it,
7 although I wasn't involved on those earlier,
8 the appeal or the special exception, something
9 just to me sounds wrong with the way the
10 Zoning Administrator then acted upon okaying
11 this latest building permit.

12 It just -- I understand the need
13 to cure a nonconformity, but it just sounds
14 like you are -- it's taking -- it is just
15 manipulating the process to a degree that puts
16 the Zoning Administrator in a position that he
17 shouldn't be in in doing things like this.
18 And I think dealing with the issues that we
19 have, whether there is discrepancies with how
20 you interpret some of the regulations, I just
21 think the Zoning Administrator has gone one
22 step beyond maybe where he should be. But I'm

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1 just a little bit troubled by that.

2 CHAIRPERSON GRIFFIS: Well said.
3 Yes?

4 VICE CHAIR MILLER: I also want to
5 say further what I was getting at before. I
6 think one of the questions is in general can
7 you convert a semi-detached dwelling to a row
8 house to avoid addressing adverse impacts
9 found by the Zoning Board and instead
10 exacerbate them by further addition? And I
11 think if you read 405.8, the way I suggest,
12 you don't have that situation.

13 CHAIRPERSON GRIFFIS: It's an
14 interesting statement. I don't agree with any
15 of it, but nonetheless, just to make sure that
16 that's on the record. It's all very
17 interesting and somewhat persuasive in all the
18 directions that we are going. We need to take
19 some action on this, obviously, that's why
20 we're here.

21 I don't think that -- in this
22 case, I clearly note great concern. Time

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1 spent deliberating is not in question here.
2 It's the element of what is the outcome and
3 what is the proper procedure to attend to?
4 And my point being if there was additional
5 information that we might have, I would be
6 happy to set this off for another time, but I
7 don't see any other additional information
8 coming in to be helpful in terms of our
9 deliberation and decision. And we do need to
10 move forward on this.

11 I think there may be a couple of
12 steps to this, but I think it's appropriate to
13 move ahead under a motion, at this point, and
14 just see where this goes. And I would be the
15 first to put this up. And I would move that
16 we uphold Appeal No. 17519 of the Advisory
17 Neighborhood Commission 2E. And I'm going to
18 ask for a second for discussion and I will
19 give you my rationale for that, if there is a
20 second.

21 VICE CHAIR MILLER: Second.

22 CHAIRPERSON GRIFFIS: Thank you.

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1 My rationale for upholding the appeal, first,
2 is not based on the fact that there is a
3 persuasive argument that a conversion of a row
4 dwelling is not allowed. I find that it, in
5 fact, is allowed in this zone district. And
6 it is also not in the fact that it was not in
7 the provision in conformance with 405.8 or
8 405.3 or as the discussion has come up that it
9 would have needed requirement in 223 or
10 2001.3.

11 But, frankly, goes to the more and
12 very specific to this particular case and
13 situation, Mr. Turnbull has really
14 articulated, I think well, and that is the
15 fact that due to the elements of review of
16 this under the same permit and then,
17 therefore, also a 223, there is definitive
18 decisions by this Board specific to this
19 property and this addition.

20 That the requirement for the
21 Zoning Administrator, as Mr. Turnbull said, I
22 do believe as we step in the shoes, would have

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1 needed to review the overall history of how
2 this had proceeded and where it had come and,
3 therefore, the basis of the decisions of this
4 Board.

5 One, in the appeal, he would have
6 had to have looked at what was that error and,
7 therefore, how does that have to change in
8 order to make that conforming or proffer to
9 approve? But I would say even more so in the
10 special exception or 223. And I would say for
11 the elements of the 223 of which it was denied
12 by this Board, and I read in pertinent part
13 223.1, section C which is "An addition
14 together with the original building as viewed
15 from the street, alley or other public way,
16 shall not substantially visually intrude upon
17 the character, scale, pattern of houses along
18 the subject street."

19 This was found not to have been
20 met in that special exception 223 and we
21 discussed that in this order as is in the
22 public record and was issued. My point being

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1 is that of all that element, it is still the
2 same structure. That element has not changed.
3 And I say that the Zoning Administrator
4 wouldn't in clear slate go in and necessarily
5 judge that element for any other process or
6 permit that was before him.

7 But based on the fact that that
8 had already been in a forum, in a public
9 appearance, in an official order, should he
10 not have at least addressed it somehow? There
11 is no change in any of those elements that I
12 found in looking at this case and the special
13 exception.

14 And, therefore, I think that as
15 not as outrageous, but I think that there was
16 an error in reviewing and permitting this
17 entire modification of this base building
18 permit whether the history of that permit on
19 the zoning elements were not entirely
20 addressed or cured. And that's where I am.
21 Questions?

22 BOARD MEMBER MANN: I just want to

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1 make sure that I understand that. Are you
2 saying that the Zoning Administrator when
3 responding to our finding that he erred,
4 rather than responding to that information
5 correctly, he was -- I guess the question is
6 was he under an obligation to respond to that
7 or was he under an obligation to act
8 independently on new applications that were
9 received by him?

10 CHAIRPERSON GRIFFIS: If I
11 understand your question, I think what the
12 Zoning Administrator should have done or us
13 standing in the shoes of him, I would have had
14 the owner address how that was cured. And I
15 didn't see anything, because nothing changed.
16 It was not even addressed. It could have been
17 just changing. I mean, I don't think that
18 there would have been -- well, I don't want to
19 give hypotheticals.

20 But I think just in the fact that
21 that wasn't addressed, I don't think, and to
22 be absolutely clear, the Zoning Administrator

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1 on face at the base building would go in and
2 either approve a permit or not approve a
3 permit based on that element of character.
4 That is a review procedure that we do under
5 special exception. It's not the requirement
6 or responsibility, except in this particular
7 case, where the Zoning Administrator had that
8 order.

9 Just as an approval order would be
10 attached to base building permits that would
11 go through and the Zoning Administrator would
12 have to review those to see what was approved
13 or not approved. A denial, I would think
14 should do the same. And, therefore, this
15 element has not been adequately addressed.

16 VICE CHAIR MILLER: Mr. Chairman,
17 though, I'm not sure where that leads, because
18 if the ZA were looking at it then, would you
19 say then if you look at the end result that he
20 would have been required to deny the permit,
21 because of the BZA order dealing with the
22 property before when it was subject to special

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1 exception?

2 CHAIRPERSON GRIFFIS: It's an
3 excellent question and I haven't answered that
4 or even addressed it, because I don't find
5 that I need to. What I have found is the fact
6 that it wasn't even addressed. It wasn't even
7 looked at, is the error of which I am finding
8 this appeal.

9 VICE CHAIR MILLER: Where is he
10 required to, if it's a new application like
11 you said, come in for a permit for a row
12 dwelling, how does the special exception order
13 that applies to a semi-detached dwelling
14 require him to look at that?

15 CHAIRPERSON GRIFFIS: Are you
16 talking generally or in this specific case?

17 VICE CHAIR MILLER: Well, even in
18 this specific case. I mean, if we're going to
19 have a reason for --

20 CHAIRPERSON GRIFFIS: I think --

21 VICE CHAIR MILLER: -- granting
22 the appeal --

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1 CHAIRPERSON GRIFFIS: Here is
2 where I --

3 VICE CHAIR MILLER: -- it has got
4 to --

5 CHAIRPERSON GRIFFIS: I think any
6 official decision by this Board in issuance of
7 an order of which would be the articulation of
8 our official decision needs to be addressed by
9 the Zoning Administrator in processing any
10 review or permits.

11 VICE CHAIR MILLER: Okay. I just
12 -- you know, it's your motion and at some
13 point I would like to insert the grounds of
14 405.8, because I think at some point this
15 could be sent back to the ZA to address and we
16 would still have the same problem. He could
17 just say okay, I looked at it and so but now
18 it's a row dwelling application.

19 CHAIRPERSON GRIFFIS: Yes. I
20 don't disagree or agree. I'm not projecting
21 out what he should have done. I've just found
22 the grounds of which I find is in error and

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1 the procedural elements. I'm not even going
2 to articulate or hypothesize of what could
3 have been correct or not correct.

4 But there it is. We've got a
5 simple motion before us. It is seconded. I'm
6 ready to call it up or down.

7 COMMISSIONER TURNBULL: Well, Ms.
8 Miller, are you looking to add something on to
9 that motion?

10 VICE CHAIR MILLER: Well, you
11 know, procedurally, I'm not sure how we do
12 this, but I would like to, at some point, move
13 that we grant the appeal based on that the
14 Zoning Administrator made an error, that he
15 didn't send the permit to the BZA to look at
16 as a special exception because of section
17 405.8.

18 CHAIRPERSON GRIFFIS: Understood.
19 That would be a separate motion.

20 VICE CHAIR MILLER: That would be
21 a separate motion after we vote on your
22 motion?

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1 CHAIRPERSON GRIFFIS: That's
2 correct.

3 VICE CHAIR MILLER: Okay.

4 CHAIRPERSON GRIFFIS: Maybe. Any
5 other discussion?

6 COMMISSIONER TURNBULL: I think I
7 like the way you framed it. I think there was
8 a process problem that happened with the
9 Zoning Administrator's review of this without
10 looking at, as you stated before, the past two
11 instances regarding this property. And I
12 would agree with you.

13 VICE CHAIR MILLER: Mr. Chairman?

14 CHAIRPERSON GRIFFIS: Interesting.

15 VICE CHAIR MILLER: Could you also
16 cite where the Zoning Administrator is
17 required to have considered those previous
18 orders when looking at this particular
19 application?

20 CHAIRPERSON GRIFFIS: Can I cite?
21 I think I would have to rely on the
22 jurisdiction of the Board to hear and grant

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1 motions to approve or deny those. Special
2 exceptions and variance must go directly to
3 the permitting of this. I can certainly take
4 time and get into the regulations.

5 VICE CHAIR MILLER: But in this
6 case, he wouldn't have decided that it was --

7 CHAIRPERSON GRIFFIS: In this
8 case --

9 VICE CHAIR MILLER: In looking at
10 whether or not it needed a special exception?

11 CHAIRPERSON GRIFFIS: Let me be
12 clear.

13 VICE CHAIR MILLER: Because of the
14 zoning orders?

15 CHAIRPERSON GRIFFIS: It is an
16 incredibly unique circumstance this case and
17 my assertion. I don't disagree. However, I
18 look at it in a procedural element. If we
19 were to grant a special exception in 223 and
20 a modification to a permit went to the Zoning
21 Administrator on this specific case, that
22 approval would be attached to the permit

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1 documents and, therefore, would have needed to
2 have been addressed, right?

3 The Zoning Administrator would
4 have kicked it out, except for the approval of
5 a 223. So I don't see any difference
6 procedurally, fundamentally in saying well,
7 there was a denial and should not that denial
8 also have been attached and been aware of the
9 Zoning Administrator.

10 Now, how that is dealt with, I am
11 not reaching that element, except for the fact
12 that there is an error that it was not
13 addressed that he had seen it and saw that
14 there was something that wasn't fundamentally
15 changed, based on the denial of this Board.
16 That situation changed not. So we are here
17 again with that past procedure or that past
18 element that I think needed to at least have
19 been acknowledged or addressed in the review.

20 VICE CHAIR MILLER: You know,
21 actually, my recollection is, and I have to
22 look at the transcript again, I guess, that

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1 actually I think the ZA did look at the orders
2 and thought that this was the way that the
3 applicant was intending to cure the situation.

4 CHAIRPERSON GRIFFIS: Oh, no.

5 VICE CHAIR MILLER: I am not -- he
6 did not not look at the orders.

7 CHAIRPERSON GRIFFIS: Good. You
8 know, I totally agree.

9 VICE CHAIR MILLER: Okay.

10 CHAIRPERSON GRIFFIS: He said, in
11 fact, that the 223 was coming and that the row
12 dwelling actually was a matter-of-right and
13 the fact that 223 was not required, that 223
14 review was not required. I don't disagree on
15 that legal argument from the Zoning
16 Administrator and the correctness.

17 However, I still believe that we
18 have an element, and that's why it goes to why
19 I read it, the condition of character, scale
20 and pattern of houses. There still was a
21 fundamental decision by the Board. That
22 carried through. It was the same base

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1 building permit. There is no change of that.
2 I don't see how that was addressed and I don't
3 see why that doesn't carry through.

4 VICE CHAIR MILLER: Well, maybe it
5 does carry through then. Then I think that
6 the result would be not to send him back to
7 the ZA to look at that element, but that it's
8 up to this Board to say if that element wasn't
9 addressed, then perhaps the permit should have
10 been denied and that it was in error if they
11 didn't cure that, if that's what you're
12 saying. I agree.

13 CHAIRPERSON GRIFFIS: Isn't that
14 what I'm saying?

15 VICE CHAIR MILLER: Is that what
16 you're -- no, I don't know. I thought you
17 were saying send it back for him to address
18 it, but I think, at this point --

19 CHAIRPERSON GRIFFIS: No. I'm not
20 saying what the remedy is on it. I'm saying
21 I'm finding the error.

22 VICE CHAIR MILLER: I don't think

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1 that's enough.

2 CHAIRPERSON GRIFFIS: That's fine.

3 VICE CHAIR MILLER: I think at
4 this point, send it back.

5 CHAIRPERSON GRIFFIS: Do you see
6 that?

7 VICE CHAIR MILLER: I think if it
8 was -- if that wasn't cured with respect to
9 the character of the neighborhood or whatever,
10 then I think it's up to the Board, at this
11 point, to say then they couldn't have done a
12 further addition. I just --

13 CHAIRPERSON GRIFFIS: We did say.

14 VICE CHAIR MILLER: Now by
15 converting it to a row dwelling, if that's --
16 I wouldn't say it doesn't mean anything just
17 to say that he needed to look at that.

18 CHAIRPERSON GRIFFIS: Interesting.
19 Okay. Anything else? We need to move forward
20 then. We do have a motion. It has been
21 seconded. Is there any other additional
22 comments?

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1 VICE CHAIR MILLER: Yes, I don't
2 understand what we're voting on then, at this
3 point. Are we saying that the ZA should have
4 addressed that aspect of the Board's order or
5 are we saying that he should not have approved
6 a further addition with that aspect not being
7 cured?

8 CHAIRPERSON GRIFFIS: What?

9 VICE CHAIR MILLER: In the special
10 exception order.

11 CHAIRPERSON GRIFFIS: Yes.

12 VICE CHAIR MILLER: We deny the
13 special exception on grounds that the addition
14 to the nonconforming structure was out of
15 character with the neighborhood and also had
16 an adverse impact on one of the neighbor's
17 light and air. Given that those two aspects
18 upon which the special exception was denied
19 were not cured by the further addition of
20 converting it to a row house, did the ZA err
21 for approving that addition?

22 That they couldn't do the addition

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1 when there was -- if it didn't cure the
2 problems that we identified in denying the
3 special exception.

4 CHAIRPERSON GRIFFIS: Interesting.

5 VICE CHAIR MILLER: You initially
6 started it out as he didn't address it.

7 CHAIRPERSON GRIFFIS: That's
8 right.

9 VICE CHAIR MILLER: And I'm
10 saying --

11 CHAIRPERSON GRIFFIS: You're
12 taking it much too far. You are taking it
13 well beyond anything that I stated.

14 VICE CHAIR MILLER: I'm saying
15 addressing would just prolong the agony here.

16 CHAIRPERSON GRIFFIS: I don't have
17 any difficulties.

18 VICE CHAIR MILLER: I think it's
19 the Board's decision whether or not -- I don't
20 think that's enough of an error. I think he
21 probably did address it, did look at the
22 orders and didn't think that it was necessary

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1 because it was a row house now.

2 CHAIRPERSON GRIFFIS: Okay.

3 VICE CHAIR MILLER: Okay.

4 CHAIRPERSON GRIFFIS: I don't --

5 COMMISSIONER TURNBULL: But I
6 think Mr. Chairman is correct and maybe you're
7 right by saying that that needs to be inserted
8 into our language.

9 VICE CHAIR MILLER: Well, it's the
10 Chairman's motion. I don't know if he is
11 actually going to say that. That's why I want
12 to know what the motion actually is.

13 CHAIRPERSON GRIFFIS: The motion
14 is to uphold the appeal based on the fact that
15 there is an error of the Zoning Administrator
16 in approving this permit and not reviewing the
17 previous order and showing evidence of curing
18 the element of which the special exception was
19 denied. I don't have any difficulty if you
20 don't support the motion. I mean, certainly,
21 you have the right to do it.

22 VICE CHAIR MILLER: I just want to

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1 be clear what we're voting on. Are we voting
2 on that he didn't review it sufficiently or
3 are we voting on that it was an error because
4 it didn't cure the deficiencies that were the
5 basis for our denial of the special exception?

6 CHAIRPERSON GRIFFIS: Right smack
7 dab in the middle. There was no evidence that
8 it was addressed. There was no change. There
9 is fundamentally no change. I don't need to
10 go any further than that. I don't need to
11 hypothesize what he should have done or what
12 can be done or where it should be done, none
13 of that. I don't need to do it. I don't
14 think it's productive for this.

15 VICE CHAIR MILLER: I think that's
16 really the main point here, because I think
17 the ZA --

18 CHAIRPERSON GRIFFIS: I understand
19 that you don't support the motion.

20 VICE CHAIR MILLER: I think the ZA
21 reviewed. Well, I might support it if it went
22 further. I don't think that the ZA -- I mean,

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1 I do think that the ZA reviewed to the best of
2 his ability the history of the case.

3 CHAIRPERSON GRIFFIS: Okay.

4 VICE CHAIR MILLER: And made a
5 decision that that aspect of it was no longer
6 controlling, because it was being converted to
7 a row dwelling.

8 CHAIRPERSON GRIFFIS: Okay.

9 VICE CHAIR MILLER: So if your
10 motion is that you grant the appeal, because
11 he should have reviewed our decision, yes.

12 CHAIRPERSON GRIFFIS: Here is the
13 differentiation and you moved it much further
14 than it was thought to be, but because I
15 didn't go to the light and air. You mentioned
16 that, the light and air. And you talked about
17 the elements. None of it was addressed in
18 making this for matter-of-right semi-detached
19 or semi-detached existing to a matter-of-right
20 row dwelling.

21 None of that conversion, none of
22 these elements that we're talking about

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1 addressed specifically this aspect that the
2 Board was definitive of in its special
3 exception review. That's why I find it
4 absolutely -- it removes itself from all the
5 side yard discussion and all that. And all
6 the Zoning Administrator should have done is
7 noted that there was something that addressed
8 in the modifications to the exact same permit
9 that this was dealt with.

10 And I'm not projecting out how it
11 was to be dealt with or not dealt with, but it
12 should have been addressed that there was
13 something changed. Otherwise, how do we sit
14 with the same massing on the same elements
15 that we found not to be in character and,
16 therefore, couldn't even meet the special
17 exception requirements?

18 VICE CHAIR MILLER: Okay. I'm
19 just not sure. If you want to change it then,
20 because basically --

21 CHAIRPERSON GRIFFIS: I'm ready to
22 concede that I can't convince you.

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1 VICE CHAIR MILLER: No.

2 CHAIRPERSON GRIFFIS: I don't need
3 to keep arguing.

4 VICE CHAIR MILLER: I can go to --
5 I just think the Board has to say I don't
6 think he knew how to exactly address the
7 deficiencies. I think he did it in the sense
8 that he thought they no longer were --

9 CHAIRPERSON GRIFFIS: But he isn't
10 to address the deficiencies. He is to review
11 the new submissions. The modifications to
12 these permits and then address it. There were
13 no modifications that even addressed that
14 element of which the Board found it could not
15 approve a special exception. That's it on it.

16 VICE CHAIR MILLER: I think
17 though, at this point, it's up to the Board to
18 give him direction to say either --

19 CHAIRPERSON GRIFFIS: I disagree.
20 Not in this motion. Not for what I found was
21 an error.

22 VICE CHAIR MILLER: How do you

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1 know he didn't review it? I think he did
2 review it. Oh, he didn't address it.

3 CHAIRPERSON GRIFFIS: There's no
4 change.

5 VICE CHAIR MILLER: He didn't
6 address it.

7 CHAIRPERSON GRIFFIS: There was no
8 change.

9 VICE CHAIR MILLER: And he is
10 going to look to the Board for guidance as to
11 how to address it and we're not going to give
12 it to him, basically, based on this motion.
13 And so I don't -- okay. I wouldn't support
14 that then, because, to me, it's nothing. I
15 mean, it's kind of like I think that's an
16 important point, if we can reach it today,
17 maybe we can't.

18 CHAIRPERSON GRIFFIS: I
19 understand.

20 VICE CHAIR MILLER: You know, but
21 what do you do with we had an order that found
22 those deficiencies so that a special exception

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1 was denied.

2 CHAIRPERSON GRIFFIS: Right.

3 VICE CHAIR MILLER: What do you
4 do?

5 CHAIRPERSON GRIFFIS: Certainly if
6 part of the modification of the existing base
7 building permit brought it more into
8 character, scale and pattern of houses along
9 the street frontage, then the Zoning
10 Administrator would have been able to address
11 that and say wow, not only are they making it
12 matter-of-right, putting it as a row dwelling,
13 they are also addressing the fact that they
14 have changed this and it is now addressing,
15 and maybe he makes a judgment call, because he
16 has had to, the fact that it is now more in
17 keeping with the pattern of character and
18 scale of the houses along the street, which
19 would be pretty straightforward.

20 VICE CHAIR MILLER: Okay. But you
21 also have the light and air aspect of that
22 order as well, which was not affected. If

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1 anything was, you increased adverse impacts.

2 CHAIRPERSON GRIFFIS: Now, I'm
3 starting to --

4 VICE CHAIR MILLER: But it
5 certainly wasn't --

6 CHAIRPERSON GRIFFIS: -- address
7 all the issues that you wanted me to, but I
8 haven't. I think the light and air go to a
9 different aspect of the 223. And when you
10 bring it into a matter-of-right row dwelling,
11 I have purposefully not addressed that for the
12 Zoning Administrator to have looked at the
13 provisions of the row dwelling elements in the
14 regulations that are ingrained in dealing with
15 light and air.

16 So there was a substantive change
17 in the modification of the permit. Whether it
18 adequately or properly addressed that, I don't
19 find that we are being moved to decide on that
20 element or I'm not, at least, certainly
21 convinced to be.

22 VICE CHAIR MILLER: Well, I hear

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1 your point about it. It's possible, so I
2 don't know. It's possible that by doing the
3 addition and converting it to a row house that
4 it might have been more in character with the
5 neighborhood. It's possible. But I'm not
6 sure that there was anything done that would
7 have improved the light and air deficiency
8 that we found in the special exception
9 decision.

10 CHAIRPERSON GRIFFIS: Yes, but I
11 mean, you're just taking it in a whole
12 different direction.

13 VICE CHAIR MILLER: So, Mr.
14 Chairman, just so that I understand
15 procedurally that if we vote on your motion
16 that I would then have the opportunity to put
17 forward my motion to be voted on subsequently?

18 CHAIRPERSON GRIFFIS: It depends
19 if my motion succeeded, you wouldn't.

20 VICE CHAIR MILLER: Why not?

21 CHAIRPERSON GRIFFIS: It would be
22 over.

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1 VICE CHAIR MILLER: I think there
2 are two different grounds for granting a
3 motion of the appeal.

4 CHAIRPERSON GRIFFIS: I understand
5 your point. I'm happy to table my motion.
6 You're the seconder. I would certainly table
7 my motion if you would like to propose a
8 motion in front of it.

9 VICE CHAIR MILLER: Okay. Thank
10 you. I'll do that.

11 CHAIRPERSON GRIFFIS: Excellent.
12 Let's move ahead. What's your motion?

13 VICE CHAIR MILLER: The motion is
14 to grant Appeal No. 17519 of Advisory
15 Neighborhood Commission 2E that the Zoning
16 Administrator erred in issuance of the permit
17 on grounds that the Zoning Administrator
18 should have sent the permit to BZA for
19 consideration of a special exception for
20 noncompliance with 405.8.

21 CHAIRPERSON GRIFFIS: Is there a
22 second?

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1 COMMISSIONER TURNBULL: Are you
2 ignoring everything then about the previous
3 two, the appeal on the special exception then?

4 VICE CHAIR MILLER: Okay. I can
5 add to it, if you want me to add to it, since
6 I don't have a second. And on grounds that
7 the Zoning Administrator should have -- okay,
8 let me think about it. My reasoning is 405.8.
9 I could take an amendment to the motion, I
10 guess.

11 CHAIRPERSON GRIFFIS: Would you
12 like to second and address an amendment to the
13 motion?

14 COMMISSIONER TURNBULL: I'm not
15 sure. I guess I'm confused by both, which way
16 we're going on this. I would agree that the
17 Zoning Administrator made an error and I guess
18 that's trying -- it's a fine line or trying to
19 separate the 405.8 and your original motion.

20 CHAIRPERSON GRIFFIS: Right. They
21 are not going to join. They are two very
22 separate and distinct arguments that are being

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1 put forth here and if I can articulate as Ms.
2 Miller has encapsulated it, she is saying very
3 definitively and I think very orderly that the
4 error that the Zoning Administrator conducted
5 was the fact that under 405.8, she is reading
6 it as the permit, modification to the existing
7 base building permit that's under appeal now
8 shows a decrease in the width of the existing
9 side yard.

10 And that should have, she is
11 saying, have come to the Board under special
12 exception. I don't know what element of
13 special exception, but should have come to the
14 Board for review, because that would not have
15 been a matter-of-right addition or whatever it
16 is.

17 VICE CHAIR MILLER: And I'm saying
18 that 2001.3 did not trump this regulation,
19 because the nonconformity was being extended,
20 even though it extended to the point where it
21 was eliminated by a conversion to a row house.
22 And that this decision should have been sent

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1 to the Board for review under 223.

2 COMMISSIONER TURNBULL: Well, are
3 both these motions strong enough to stand on
4 their own separately?

5 CHAIRPERSON GRIFFIS: Do you want
6 to go off the record and vote?

7 COMMISSIONER TURNBULL: Or are we
8 trying to --

9 VICE CHAIR MILLER: We can --

10 COMMISSIONER TURNBULL: Are we
11 trying to merge them?

12 CHAIRPERSON GRIFFIS: No.

13 VICE CHAIR MILLER: We don't have
14 to. We can vote separately on each one. I
15 think this is a specific regulation that is
16 predictable, that the facts fall squarely
17 within, that there was an existing building,
18 nonconforming dwelling that existed prior to
19 the Zoning Regulations, it was added to, that
20 the side yard was decreased and I think it
21 falls squarely within that regulation.

22 It's not to say that we can't have

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1 two separate motions as to reasons why we
2 think the ZA erred.

3 CHAIRPERSON GRIFFIS: So in your
4 case, in my understanding, the motion has not
5 been seconded. So you're saying that the
6 Zoning Administrator should have read 405.8
7 and said look, we've got an existing building
8 here. It was built on or before May 12, 1958.
9 It had a side yard that's less than 8 feet,
10 right?

11 And there is a proposal of an
12 addition to that. And that proposed addition
13 will remove the side yard and that is, in your
14 reading, a decrease and you're reading
15 decrease as a substantive change to that
16 existing side yard. And therefore, it should
17 have gone under relief from provision of
18 405.8. And one looks at a relief mechanism
19 for 405.8. One goes to 223, because it's an
20 addition to a provision that isn't meeting the
21 exact requirements and 223 is the special
22 exception that covers all of section 405. Is

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1 that right?

2 VICE CHAIR MILLER: That's
3 absolutely right.

4 CHAIRPERSON GRIFFIS: Is there a
5 second to that?

6 VICE CHAIR MILLER: And I think
7 that would also preclude the situation we have
8 here.

9 CHAIRPERSON GRIFFIS: No quick
10 response.

11 VICE CHAIR MILLER: Where someone
12 is trying to circumvent --

13 CHAIRPERSON GRIFFIS: That's not--

14 VICE CHAIR MILLER: -- our special
15 exception process.

16 CHAIRPERSON GRIFFIS: Let's state
17 the motion and get a second and then you can
18 talk about it.

19 BOARD MEMBER MANN: Mr. Chairman,
20 I am going to second that motion.

21 CHAIRPERSON GRIFFIS: Excellent.
22 Thank you very much, Mr. Mann. Further

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1 questions on that? You want to further
2 articulate then those elements?

3 VICE CHAIR MILLER: I would just
4 say that interpreting it this way would
5 preclude what we have seen here of someone
6 trying to circumvent the special exception
7 process with this type of a conversion.

8 CHAIRPERSON GRIFFIS: Right, for
9 buildings that were built on or before May 12,
10 1958.

11 VICE CHAIR MILLER: And it is --
12 exactly. It's specifically very limited and
13 I think 405.8, if you put -- apply the facts
14 of this case to the words that are in 405.8,
15 that they fit. It's a case of a building
16 existing on or before May 12, 1958.

17 CHAIRPERSON GRIFFIS: With a side
18 yard of less than 8 feet.

19 VICE CHAIR MILLER: Exactly, with
20 an addition and the side yard is being
21 decreased.

22 CHAIRPERSON GRIFFIS: Interesting.

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1 Questions? Deliberations? Comments on that?

2 VICE CHAIR MILLER: Mr. Chairman?

3 CHAIRPERSON GRIFFIS: Yes?

4 VICE CHAIR MILLER: I understand,
5 this is so that we all understand what we're
6 voting on this, that it doesn't preclude
7 another motion for another reason. Is that
8 correct?

9 CHAIRPERSON GRIFFIS: Don't
10 negotiate against yourself.

11 VICE CHAIR MILLER: Okay. I'm
12 not. I think this is the reason.

13 CHAIRPERSON GRIFFIS: Questions,
14 deliberations on this? The motion is very
15 straightforward. It is specifically tied to
16 the section. Yes, Mr. Turnbull?

17 COMMISSIONER TURNBULL: Do we have
18 two motions on it?

19 CHAIRPERSON GRIFFIS: No, we
20 don't.

21 VICE CHAIR MILLER: No.

22 CHAIRPERSON GRIFFIS: We have one

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1 before us.

2 VICE CHAIR MILLER: We don't know.
3 We just have one right now.

4 CHAIRPERSON GRIFFIS: That's it,
5 one.

6 COMMISSIONER TURNBULL: Well, I
7 kind of like yours, too. I mean, there were
8 some very positive things about that that --

9 CHAIRPERSON GRIFFIS: It's on the
10 record.

11 COMMISSIONER TURNBULL: I think
12 there are aspects of that that are integral to
13 what we were just talking about, and I just
14 feel that we're throwing that out and I don't
15 feel --

16 VICE CHAIR MILLER: No, we don't
17 have -- you know, we're still in deliberation
18 and I think there was the question of, you
19 know, a friendly amendment to my motion to
20 address what that would say and I had some
21 difficulty articulating that point. So I'm
22 open to a friendly motion, a friendly

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1 amendment if there is something else you want
2 added to it.

3 COMMISSIONER TURNBULL: Well, if
4 we could amend it to include what the Chairman
5 had discussed earlier, I mean, I think there
6 is that part that I -- when he talks about --
7 and I don't know if that's beyond what you
8 think, but I'm just throwing that out.

9 VICE CHAIR MILLER: We could just
10 take votes on different ones, yes. You know,
11 I think that it's a really important question
12 about what do you do when there was a special
13 exception order and the deficiencies weren't
14 cured and that's the issue, but the parties
15 didn't brief it and I'm just -- I'm not sure
16 how far to go with that. That is why I'm
17 recommending 405.8, because I think it's clear
18 in our regulations.

19 BOARD MEMBER MANN: Well, that's
20 the reason why I'm willing to support your
21 motion, is that I think it seems perhaps more
22 supportable by the evidence in the record.

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1 CHAIRPERSON GRIFFIS: That's
2 certainly a critical finding of fact, Mr.
3 Turnbull, in the case and that is before this
4 motion at this time of the past history of
5 this and our deliberation, of course.

6 I think it would not be -- I don't
7 think it would be -- well, I don't know. I
8 don't think the two merging make a lot of
9 sense in terms of a definitive decision by the
10 Board if one can be reached on one or the
11 other of these, because I don't find them
12 related at all. I think we should move ahead.

13 If there is an additional
14 deliberation on this, as we have other things
15 to also accomplish in our morning session, and
16 I'm feeling that there isn't more deliberation
17 required at this time or being brought forth.

18 So with that if I may just to
19 summarize the motion that is before us and has
20 also been seconded, indicates Ms. Miller's
21 motion states that the Zoning Administrator
22 erred in not finding 405.8 was completely

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1 addressed in conformity and, therefore, it was
2 not appropriate to issue a permit and should
3 have been referred to the Board for a special
4 exception under 223, not meeting those
5 provisions in 405.8. Is that correct?

6 VICE CHAIR MILLER: Yes.

7 CHAIRPERSON GRIFFIS: Very well.
8 Then with that then, we do have a motion
9 before us. It has been seconded. Let me ask
10 for all those in favor of the motion to
11 signify by saying aye.

12 VICE CHAIR MILLER: Aye.

13 BOARD MEMBER MANN: Aye.

14 COMMISSIONER TURNBULL: Aye.

15 CHAIRPERSON GRIFFIS: And opposed?
16 Opposed. Abstaining? Very well. Let's
17 record the vote.

18 MR. MOY: Staff would record the
19 vote as 3-1-1. This is on the motion of Ms.
20 Miller to grant the motion based on the ZA
21 error not being in compliance with section
22 405.8. Seconded the motion, Mr. Mann. Also

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1 in support of the motion, Mr. Turnbull.
2 Opposed to the motion, Mr. Griffis and Mr.
3 Etherly, not present and not voting.

4 CHAIRPERSON GRIFFIS: Excellent.
5 Thank you very much. Thank you. Mr.
6 Turnbull, I would thank you very much. I know
7 that you are called to other responsibilities.
8 And with that, we appreciate your
9 participation in this particular case and all
10 the others. Let's move ahead then and call
11 the next case for deliberation.

12 MR. MOY: Yes, sir. That case is
13 Application No. 17511 of Carnell Bolden,
14 pursuant to 11 DCMR section 3103.2, for a
15 variance from the lot area and lot width
16 requirements under section 401, and a variance
17 from the side yard requirements under section
18 405, to construct a new semi-detached dwelling
19 in the R-2 District at premises 5371 Hayes
20 Street, N.E., that's in Square 5209, Lot 30.

21 On October 17, 2006, the Board
22 completed public testimony, closed the record

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1 and scheduled its decision on November 14th.
2 The Board had kept the record open for the
3 applicant to file documentation regarding
4 ownership.

5 There has been no filing to that
6 effect. The Board is to act on the merits of
7 the application request for joint relief from
8 sections 401 and 405. That completes the
9 staff's briefing, Mr. Chairman.

10 CHAIRPERSON GRIFFIS: Thank you
11 very much, Mr. Moy. We appreciate that. I
12 think this was ripe for decision making some
13 time ago and, as Mr. Moy has indicated, we
14 left the record open for additional filings
15 that didn't necessarily go directly to the
16 relief that was being sought, but rather went
17 to the regulatory requirements of having
18 standing to bring a case before the Board.

19 And I don't know that I can bring
20 great articulation to this, but I think I will
21 try, and that is this. Clearly, this is a
22 purchase of -- there is an acquisition of a

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1 piece of property that is trying to be made
2 based on tax liens and the tax lien purchase,
3 which is not a very bright line process for
4 many reasons and specifically for us.

5 It isn't as if there is a fee
6 simple ownership that is being maintained and,
7 therefore, we have that person in front of us
8 or that entity or we have a letter from that
9 assigns and so all in all it becomes very
10 complex.

11 I would like to, at this point,
12 however, not make a definitive decision by the
13 Board that has been fully complied with that
14 element of ownership, but rather find that it
15 is appropriate for us to proceed as the filing
16 is full for the requirements of this and all
17 the evidence that could have been presented at
18 this point to establish the process to
19 ownership or ownership on this has been
20 presented to the Board.

21 If, in fact, and I would say this,
22 I don't need to say it, but if, in fact, that

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1 was to change in any respect, that may on face
2 change our procedures or, frankly, our
3 decision. So that being said, I think, unless
4 there is other opinions on that, I think it's
5 appropriate to move ahead with this at this
6 time unless there is any objections.

7 Not noting any objections then,
8 let's move right in and Mr. Moy did indicate
9 correctly that there was a variance from the
10 lot and area width requirements or the side
11 yard requirements for this R-2 property. As
12 you recall, it is a very small lot not
13 complying with the lot area.

14 Of course, it's 2,500 square feet.
15 3,000 would be required and the width of which
16 is also minimal of the 25 feet, not a
17 conforming R-2 to begin with. So no matter
18 what was being proposed, some sort of relief
19 just to build on this site would be required.

20 Now, one could look at it and say,
21 okay, so what? Let's keep some open air. But
22 this has been platted and existing. It's a

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1 lot that is within a whole row on a square of
2 developable lots or built on lots, and so I
3 quickly move beyond that, the fact that it
4 just should stay fallow. And so we look at
5 then, clearly, that uniqueness being made.
6 What is the practical difficulty?

7 And I think it also goes directly
8 to persuasive argument and that is if the --
9 first of all, the lot area and lot width can't
10 be changed as a control if the other parcels
11 are not under single ownership and it abuts
12 the rear yards of several others. You would
13 have to encompass, you know, numerous. It
14 starts to unravel in terms of its argument in
15 that direction.

16 And then providing the side yard
17 in that provision renders this to be a
18 difficult house to build in a semi-detached or
19 as a fully detached or semi-detached property
20 as you start to carve up that minimal
21 dimension of the site that it's on. I will
22 open it up to others.

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1 VICE CHAIR MILLER: I just want to
2 add basically that this is one of those lots
3 that were so -- it's so narrow that it
4 automatically qualifies for an exceptional
5 condition where it was before the enactment of
6 the Zoning Regulations.

7 And with respect to the side yard,
8 if they complied with the side yard
9 requirements, they would have -- the house
10 would be 17 feet wide and really no
11 development really could comply with the
12 Zoning Regulations.

13 And so those are the first two
14 elements, and that there was no detriment to
15 the public good as a result of granting the
16 variance in that the dwelling would be in
17 accordance with the general Land Use Map.
18 It's in accordance with the Ward 7 Plan to
19 stimulate development of new and rehabilitated
20 housing, and also that this was going to be
21 affordable housing.

22 And Office of Planning supports

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1 this application and it's my understanding
2 that the ANC didn't weigh in.

3 CHAIRPERSON GRIFFIS: Okay. Thank
4 you. Two issues that I would take with that,
5 but I agree with the overall recommendation.
6 And, yes, Exhibit 22, of course, Office of
7 Planning was recommending approval to this.
8 7C did not put into the application, so we
9 don't know their position.

10 The one, the affordability, this
11 is not a provision of affordable housing as
12 one might think in terms of program, but
13 rather, if I recall correctly, the record
14 reflects that there is -- the sale price will
15 be market rate for the area, but the area is
16 under a regional assessment of affordability
17 at an affordable level, but I don't think
18 that's necessarily pertinent to your position
19 nor is it mine.

20 On the element of the 17 feet, I
21 just have to take just a very quick issue with
22 that in terms of the detail, that having the

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1 dimensional requirements of exterior to
2 exterior as 17 feet does not, to me, say it is
3 impossible to have a living dwelling unit.

4 Is it practically difficult? It
5 may well be and it's part of the practical
6 difficulties. I mean, a row dwelling in an 18
7 foot dimensional requirement in an R-4
8 District, of course, has an interior dimension
9 of 16 or maybe 17 feet. So we're talking
10 about a matter of inches or feet on this.

11 However, when we're talking about
12 an R-2, it goes to the different face of what
13 the District is based on. And so if one was
14 to -- I agree with you, there is some
15 practical difficulty in terms of the 17 feet
16 dimension, not impossible, practical
17 difficulty, that's persuasive, but I think it
18 might even go -- if we went beyond that then,
19 it would go into what is the -- does it go
20 against the character of the R District or
21 come into conflict with the zone district of
22 which it's based? And that's really where I

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1 think all the confluences of these issues come
2 to rest specifically with the R-2 District,
3 but that's enough from me.

4 Is there others' comments,
5 deliberations on this? If not, let's proceed
6 then under a motion. I would move approval of
7 Application 17511, which would allow for the
8 construction of a new semi-detached dwelling
9 at the premises of 5371 Hayes Street, N.E.,
10 and would ask for a second.

11 BOARD MEMBER MANN: Second.

12 CHAIRPERSON GRIFFIS: Thank you
13 very much, Mr. Mann. I will let others
14 address the motion, if need. Very well.
15 There is no further address. It has been
16 mentioned and I think we can reiterate, of
17 course, and rely on the analysis in part of
18 the Office of Planning's and move ahead with
19 that.

20 Very well. If there is nothing
21 further, I would ask for all those in favor to
22 signify by saying aye.

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1 ALL: Aye.

2 CHAIRPERSON GRIFFIS: And opposed?
3 Abstaining? Mr. Moy?

4 MR. MOY: Yes, sir. Staff would
5 record the vote as 3-0-1. This is on the
6 motion of the Chair to approve the
7 application, seconded by Mr. Mann. Also in
8 support of the motion, Ms. Miller.

9 We have a Zoning Commission Member
10 not participating on the case. In addition,
11 we have an absentee ballot from Mr. Etherly
12 who is participating on the case, and his
13 absentee ballot is to approve the application.
14 So that gives a resulting vote to 4-0-1.

15 CHAIRPERSON GRIFFIS: Thank you
16 very much, Mr. Moy. The next case we have on
17 our agenda is 17 --

18 VICE CHAIR MILLER: Mr. Chairman,
19 I'm sorry.

20 CHAIRPERSON GRIFFIS: Yes?

21 VICE CHAIR MILLER: Is this a
22 summary order?

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1 CHAIRPERSON GRIFFIS: Interesting
2 question.

3 VICE CHAIR MILLER: I don't --

4 CHAIRPERSON GRIFFIS: I don't have
5 any difficulty with waiving our rules and
6 regulations and issuing a summary order unless
7 there is any concern from the Board Members.
8 Very well. Not noting any concern, let's
9 issue a summary order on this. Thank you very
10 much.

11 Mr. Moy, the next case on our
12 agenda has been withdrawn. Is that correct?

13 MR. MOY: That is correct, sir.
14 That is Case No. 17528 of Jerry Weinberger.

15 CHAIRPERSON GRIFFIS: Excellent.
16 Let's call the next case then.

17 MR. MOY: The next case here is
18 Application No. 17524 of Andrew and SukYang
19 Johnson, pursuant to 11 DCMR section 3103.2,
20 for a variance from the floor area ratio
21 requirements under section 771.2, to establish
22 a dry cleaners, drop-off and pick-up only, in

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1 the C-1 District at premises 1425 27th Street,
2 N.W., and that is in Square 1262, Lot 76.

3 On October 17, 2006, the Board
4 completed public testimony, closed the record
5 and scheduled this decision on November 14th,
6 and the Board requested posthearing documents.
7 These have been filed from both the applicant,
8 as well as responses from the parties.

9 The applicant's filing is
10 identified in your case record as Exhibit No.
11 32 and a filing from the party in opposition,
12 which is Alexander Ann Verkerk and that is
13 identified in your case folders under Exhibit
14 33. The Board is to act on the merits of the
15 application for the variance from the FAR,
16 which is section 771.2. And that completes
17 the staff's briefing, Mr. Chairman.

18 CHAIRPERSON GRIFFIS: Excellent.
19 Thank you very much, Mr. Moy. I want to
20 address Exhibit 33, which was the last filings
21 by the parties in opposition. I just want to
22 clarify. As I go into my deliberation on

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1 this, they have articulated quite a bit of, as
2 they talk about, inconsistencies or
3 uncertainties and that will be not the basis
4 of any decision or deliberation that I put
5 forth on this case.

6 I perfectly understand and have
7 great concern on an aside for all the elements
8 that are brought up, but clearly the Board is
9 charged with jurisdictional elements and we
10 will go directly into those jurisdictional
11 elements, some of which raised are pertinent.
12 Others are not.

13 And I want to -- I believe in my
14 mind I can expedite this and I'm certainly
15 open to other Board Members if they don't
16 agree, but I think it's appropriate for us to
17 move straight into a motion on this case and
18 then deliberate under the motion.

19 And I would move denial of
20 Application 17524 for the variance from the
21 floor area ratio requirements under 771.2
22 which, as has been proposed, is to establish

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1 a dry cleaner drop-off and pick-up at premises
2 1425 27th Street, N.W., and I would ask for a
3 second.

4 VICE CHAIR MILLER: Second.

5 CHAIRPERSON GRIFFIS: Thank you.
6 We have a filing from the applicant in the
7 last and it's clarifying actually what is
8 being requested for relief. And I would note
9 that in my deliberation I will look at the
10 requested relief of just above the one
11 allowed, and that is a 1.39 FAR. It is a bit
12 of a change from the original application.

13 And, of course, in this zone
14 district, it is a Mixed Use Zone District. It
15 is made for both residential and
16 nonresidential uses. However, it is regulated
17 based on an FAR calculation. That is the way
18 the density and the use is decided, whether --
19 well, there it is.

20 I have -- first, of course, for
21 the variance test we look at uniqueness and
22 out of that unique aspect, which may be

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1 circumstantial, it may be physical, that
2 unique aspect renders a practical difficulty
3 or it renders it difficult to fully comply
4 with our Zoning Regulations, and then we'll
5 get on to the last test and other elements of
6 this.

7 First of all, I think it fails on
8 the uniqueness. I'm looking at a property
9 that, although the extensiveness of plans are
10 not full, let us say, I believe that the
11 graphic representation and also the
12 photographic representation allows me to fully
13 understand this building.

14 I don't see where there is a
15 unique aspect of this row dwelling that lends
16 itself to say it cannot easily use just the
17 one FAR, but because it's so unique, what is
18 this uniqueness that requires it to move
19 beyond that which is allowed to extend that
20 use into further FAR.

21 It may be there. However, I don't
22 find that there was a persuasive argument put

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1 forth. In terms of the size, the dimensional
2 requirements, there was nothing presented that
3 I could even get to. And if I put it -- well,
4 there it is. That's where I rest and I can
5 move on to others, but obviously without a
6 unique aspect to rest on, I can't understand
7 what the practical difficulty in not complying
8 with it, of the one FAR.

9 Now, we are talking. Well, there
10 it is. I'll open it up to others.

11 VICE CHAIR MILLER: I just want to
12 start and clarify my position on the
13 posthearing documents, and that is that the
14 Chairman left the record open for documents
15 responsive to specific things so that those
16 items that didn't address that specifically,
17 especially factual items such as noise and
18 traffic and things like that.

19 I won't be considering what was in
20 those posthearing documents. I just would be
21 considering what was on the record and I think
22 there is a reason for that, and that a lot of

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1 those evidentiary issues occur in a hearing
2 where you can have cross examination and
3 things like that. And I think the record was
4 full enough in any event on the variance
5 question.

6 And I'm with the Chairman as well.
7 The first element of a variance is uniqueness
8 and I don't see in this case how this
9 particular building is unique from the other
10 buildings on the block or in any way to
11 justify variance relief.

12 So regardless of whether they may
13 have some practical difficulty in doing the
14 business that they want to open there, that is
15 not sufficient. A practical difficulty has to
16 arise out of the uniqueness of the structure
17 and it's just not there.

18 And I think there were questions
19 certainly raised with respect to public
20 detriment that could occur with respect to
21 this operation operating out of that
22 structure, but I don't think we even need to

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1 go there, because I think you first have to
2 find uniqueness and that is just not here in
3 this case as far as I can see.

4 CHAIRPERSON GRIFFIS: Excellent.
5 Others? Yes?

6 BOARD MEMBER MANN: Just to add
7 briefly to that. There was also information
8 or discussion during the hearing as to whether
9 or not it had gone through other
10 administrative bodies like HPRB or Old
11 Georgetown Act and that discussion has nothing
12 to do really with our zoning decision so much
13 as it has to do with understanding the full
14 range of information that might help us make
15 a decision or see if other information is
16 uncovered that does affect our zoning
17 decision.

18 I don't think any of that
19 information surfaced from those discussions,
20 but that was one of the things that was raised
21 in the submission that we received after the
22 hearing.

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1 CHAIRPERSON GRIFFIS: Excellently
2 put and good clarification. Okay. Anything
3 else? Any other deliberation? No further
4 deliberation then. We do have a motion before
5 us. It has been seconded. I would ask for
6 all those in favor to signify by saying aye.

7 ALL: Aye.

8 CHAIRPERSON GRIFFIS: And opposed?
9 Abstaining? Mr. Moy?

10 MR. MOY: Staff would record the
11 vote as 3-0-0. This is on a motion of Mr.
12 Griffis to deny the application, seconded by
13 Ms. Miller. Also in support of the
14 application, in support of the motion, Mr.
15 Mann. Mr. Chairman, we also have two absentee
16 ballots.

17 CHAIRPERSON GRIFFIS: Excellent.

18 MR. MOY: One from Mr. Etherly, of
19 course, and one from Mr. Turnbull.

20 CHAIRPERSON GRIFFIS: Good.

21 MR. MOY: Mr. Etherly's ballot
22 vote is to approve the application. Mr.

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1 Turnbull's ballot vote is to deny the
2 application with the words, if I may read,
3 "Uniqueness not met, operational aspects not
4 clearly defined relating to the amount of
5 space involved and the FAR involved." So that
6 would give the final resulting vote of 4-1-0.

7 CHAIRPERSON GRIFFIS: Interesting.
8 Excellent. Thank you very much. I don't
9 think we would waive our rules and
10 regulations, unless we -- well, I think we
11 could. Should we do a summary order on this?
12 No, we'll do a full order on this, indeed.

13 VICE CHAIR MILLER: Right.

14 CHAIRPERSON GRIFFIS: Yes. Okay.
15 Very well. Let's move ahead.

16 MR. MOY: The next application is
17 No. 17525 of Braxton Hotel and Condominium,
18 LLC, pursuant to 11 DCMR section 3103.2, for
19 a variance from the lot occupancy provisions
20 under section 403, a variance from the rear
21 yard requirements under section 404, a
22 variance from the court requirements under

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1 section 406 and variances from the
2 nonconforming structure and use provisions
3 under subsections 2001.3 and 2002.5, to allow
4 the enlargement of an existing hotel or
5 transient rooming house to an inn in the R-5-E
6 District at premises 1440 Rhode Island Avenue,
7 N.W. That is in Square 211, Lot 839.

8 On October 17, 2006, the Board
9 completed public testimony, closed the record
10 and scheduled its decision on November 14th.
11 The Board requested posthearing documents,
12 primarily an agreement between the party and
13 the applicant.

14 That has been received into the
15 record from both the applicant and the law
16 firm representing Patricia Aronson, and these
17 are identified in your case records as Exhibit
18 39 and Exhibit 40, respectively. The Board is
19 to act on the merits of the application for
20 the variances requested. That completes the
21 staff's briefing, Mr. Chairman.

22 CHAIRPERSON GRIFFIS: Thank you

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1 very much, Mr. Moy. This is a fascinating
2 case. That being said, we don't need to spend
3 a lot of time with it. The Office of
4 Planning, of course, is recommending approval
5 and I think we can -- I look to their analysis
6 at great reliance in terms of my deliberative
7 comments on this.

8 It's Exhibit No. 30, but just to
9 frame our discussion as we move forward, one
10 would say, my gosh, there is an awful lot of
11 variances being required on this and, on face,
12 I think we were all met with that in
13 preparation for the Public Hearing when we
14 went forward.

15 And as we really got into and
16 delved into the history of why it was before
17 us and what was changing, we realized that
18 this was, as you recall, in for a permit for
19 a matter-of-right use where there then was a
20 designation of the existing structure.

21 So, clearly, it was shown in
22 evidence in the record that a matter-of-right

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1 new building could be built on this lot. To
2 me that really -- in one sense I said, well,
3 my gosh, why are we looking at so many
4 variances then?

5 But then when we look at, it
6 actually supports strongly the presentation of
7 this case generally saying, because one could
8 say, look, we could deal with this lot in a
9 matter-of-right scenario, but based on the
10 fact that it has been now designated and then
11 has, therefore, gone through the Historic
12 Preservation Review Board and we don't -- in
13 this case we are not questioning any of those
14 decisions by the HPRB, but taking them as
15 definitive directions for the developer or
16 applicant in this case.

17 All of those then rely on -- well,
18 all of those have evidenced themselves in the
19 kind of pushing and pulling of the massing of
20 an addition to an existing structure. It is
21 complying with the height, of course, the 90
22 feet which is allowed in the R-5-E District,

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1 and the major piece is the lot occupancy as it
2 comes in.

3 We looked at the use also as a
4 change and that is based on the existing
5 structure and the dimensional separation and
6 the pattern of windows and the ability of the
7 layout for the footprint as one is not
8 removing the existing structure, but trying to
9 reinvigorate, revitalize that existing
10 structure into a conforming or really a
11 productive market rate use in this area in the
12 city and, at this time, all of which I find
13 being very persuasive in terms of the rear
14 yard requirements in terms of fitting the
15 massing of this, the court requirements, which
16 were based on the existing structure.

17 Of course, those elements are
18 nonconforming aspects of this structure. And
19 then, of course, how one, as I have just said,
20 accommodates a new use, which is fundamentally
21 nonconforming. The uniqueness, I think, is
22 really rested and very strongly rested in the

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1 existing structure and all of those elements.

2 There is numerous aspects of the
3 uniqueness, but the uniqueness comes from this
4 existing structure. The practical
5 difficulties go directly to those provisions
6 and the requirement, and I have addressed
7 those very broadly, but clearly we're not
8 removing any of the existing nonconforming
9 aspects.

10 Really, to me this boils down to
11 an entirely change of project and it is
12 because of this existing structure, because
13 it's not just it was going to be apartments or
14 condos. It is now have to fundamentally
15 change the transient nature, but the hotel or
16 inn, what is now being designated in this, and
17 the whole reasoning is because of this
18 existing structure, the windows, the
19 separation of the lot lines and the structures
20 adjacent to it.

21 There was some talk about whether
22 there was a requirement to, you know, increase

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1 the number of rooms and the density and all of
2 that. I think those were adequately addressed
3 as being part of the requirements for this to
4 be a productive revitalization, but certainly
5 didn't arise any sort of detrimental impact
6 around the area.

7 Fundamentally, lastly, I don't
8 find that this flies in the face or is
9 disregarding any of the Zoning Map or goes
10 against the public good, and I would support
11 this application at this time. I will open it
12 up to others for their comments and
13 deliberation. No, not yet.

14 VICE CHAIR MILLER: I'm just going
15 to add a couple, because I think you have
16 covered most of it.

17 I may even be redundant, but I
18 just want to say that to me it clearly met all
19 three prongs of the variance test and it was
20 unique in many ways, but the most important
21 one that I found was its designation as a
22 landmark, which then required it to seek

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1 variances to make changes because of
2 constraints imposed by Historic Preservation
3 and that was -- there were real practical
4 difficulties there.

5 And we heard some very compelling
6 testimony about how much money has already
7 been spent on this project and then how much
8 more to change, and that this was actually the
9 only viable means of going forward, and that
10 there is no public detriment or impairment to
11 the intent, purpose or integrity of the Zone
12 Plan.

13 There isn't any adverse impact to
14 the neighboring properties. It's within the
15 scale of neighboring buildings. Of course,
16 the Office of Planning is supporting it and
17 the ANC is supporting it and it has concept
18 approval by HPRB. There was one party
19 participant in this case and it appears that
20 her concerns were met with the construction
21 agreement that has been submitted in the
22 record.

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1 CHAIRPERSON GRIFFIS: Excellent.
2 Anything else? I think it's appropriate to
3 move forward then under a motion, and I would
4 move approval of Application 17525 of the
5 Braxton Hotel and Condominium, LLC.

6 This is for the variance from the
7 lot occupancy provisions under 403, a variance
8 from the rear yard requirements, 404, a
9 variance from the court requirements, 406, a
10 variance from nonconforming structures and use
11 provisions under 2001.3 and 2002.5, and this
12 would allow the enlargement of the existing
13 hotel or, as classified, the transient rooming
14 house to an inn in the R-5-E District at
15 premises 1440 Rhode Island Avenue, N.W., and
16 would ask for a second.

17 BOARD MEMBER MANN: Second.

18 CHAIRPERSON GRIFFIS: Thank you.
19 You know, it's interesting that we can get
20 through so quickly, essentially, a use
21 variance and I think that what we haven't
22 addressed, but I think the record shows and

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1 reflects, is that there is an existing, it's
2 a continuing, and the way the regulations have
3 actually dealt with a change of uses and how
4 we allow uses from rooming house or transient
5 to hotel.

6 I think it's fairly persuasive
7 that even with this addition and adding into
8 the rooms, the number of rooms, that this is
9 a continuation of an existing use, maybe not
10 directly as the regulations look at it, but I
11 think in common sense and practicality, it's
12 the current use and it has been and existed in
13 great harmony with the surrounding
14 neighborhood and nothing, of course, has
15 brought forth that that would change or create
16 any adverse impact to the public good.

17 And going to the practical
18 difficulty, I think it all is related, too.
19 In fact, where I began is where I'll end and
20 that this use, what is being provided, this
21 product actually goes directly to all those
22 area reliefs that are being sought and more

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1 so, but specifically to the area reliefs and
2 that's the court, the small area of courts and
3 the distance between the window lines and the
4 properties, all of which don't accommodate for
5 a new residential unit, but rather for short-
6 term stay or more of an inn or hotel use.

7 Okay. Anything else then?

8 VICE CHAIR MILLER: I just want to
9 add that actually I was saying that some of
10 the economic hardship I was characterizing as
11 a practical difficulty, but in fact it does
12 rise to the threshold for a use variance of
13 undue hardship --

14 CHAIRPERSON GRIFFIS: Excellent.

15 VICE CHAIR MILLER: -- in this
16 case.

17 CHAIRPERSON GRIFFIS: Excellent,
18 and that's adequately said. And just to
19 address that is that I don't think we would
20 require it. Obviously, we didn't require huge
21 pro formas and comparable prices.

22 I think the case was made very

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1 easily on more of, let's say, a common sense
2 approach of they gave us some dollar amounts
3 of what was sales and cost and also then what
4 was to be required and provided, and I think
5 on principle that it is a persuasive argument
6 that there was that economic hardship and that
7 there was a hardship in terms of use based on
8 the economics, but also on the layout, the
9 physical layout or provision of residential
10 units.

11 Okay. Anything else then?

12 VICE CHAIR MILLER: There was a
13 condition that was proposed that we might just
14 address.

15 CHAIRPERSON GRIFFIS: Oh, I'm
16 sorry.

17 VICE CHAIR MILLER: In the
18 posthearing filing.

19 CHAIRPERSON GRIFFIS: That's
20 exactly what I was going to do. Yes, good.
21 I have not attached conditions to the motion.

22 VICE CHAIR MILLER: Right.

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1 CHAIRPERSON GRIFFIS: Okay.

2 VICE CHAIR MILLER: I think that
3 the parties submitted a construction agreement
4 that actually, I believe, covers that proposed
5 condition and I don't think that we heard
6 much, if any, evidence in the record that goes
7 to this condition so that I would be inclined
8 not to attach it as a condition, but recognize
9 that the applicant is bound to it in the
10 construction agreement that was signed by the
11 parties.

12 CHAIRPERSON GRIFFIS: Right.

13 VICE CHAIR MILLER: And it's in
14 the record.

15 CHAIRPERSON GRIFFIS: I think it's
16 appropriately addressed in the construction
17 agreement and, actually, the specifics of
18 which and how it's going to be dealt with I
19 think is appropriately done, and I would
20 concur and I would not attach any conditions
21 to this motion that we now have before us.

22 Any other comments, discussion,

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1 deliberation? If there is nothing further, we
2 do have a motion before us. It has been
3 seconded. I would ask for all those in favor
4 to signify by saying aye.

5 ALL: Aye.

6 CHAIRPERSON GRIFFIS: And opposed?
7 Abstaining? Mr. Moy?

8 MR. MOY: Yes. Staff would record
9 the vote as 3-0-0. This is on the motion of
10 the Chair to approve the application, seconded
11 by Mr. Mann. Also in support of the motion,
12 Ms. Miller. Mr. Chairman, we also have two
13 absentee ballots.

14 CHAIRPERSON GRIFFIS: Excellent.

15 MR. MOY: One from Mr. Etherly,
16 one from Mr. Turnbull. Mr. Etherly's vote is
17 to approve the application. Mr. Turnbull's
18 vote is to also approve the application with
19 the comments "Unique opportunity, considering
20 the degree of hardship to develop this
21 important property." So that would give a
22 final vote of 5-0-0.

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1 Would staff like to consider
2 wavering, wavering, waiving the application
3 for a summary order?

4 CHAIRPERSON GRIFFIS: I don't see
5 any difficulty in doing that, waive our rules
6 and regulations and issue a summary order on
7 this, unless there is any objection.

8 BOARD MEMBER MANN: No.

9 CHAIRPERSON GRIFFIS: Very well.
10 Not noting any objection. So what?

11 MR. MOY: The next application for
12 a decision is No. 17527 of John R. Klein,
13 pursuant to 11 DCMR section 3104.1, for a
14 special exception to continue the use of an
15 accessory parking lot under sections 213 and
16 2303. The parking lot was last approved under
17 BZA Order No. 16659, dated June 13, 2001, in
18 the R-1-B District at premises 4418-4420
19 Connecticut Avenue, N.W., and that is in
20 Square 1971, Lot 825.

21 On October 17, 2006, the Board
22 completed public testimony, closed the record

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1 and scheduled its decision on November 14th,
2 and the Board did not request any supplemental
3 information. So the Board is to act on the
4 merits of the application request for the
5 special exception under sections 213 and 2303.
6 And that completes the staff's briefing, Mr.
7 Chairman.

8 CHAIRPERSON GRIFFIS: Excellent.
9 Thank you very much. Let's get right into
10 this. However, I have noted the time and I
11 just want to make a comment in terms of those
12 that are here for our afternoon session.
13 We're obviously still in our morning session
14 and we will take a brief, but needed, lunch
15 break. I would not anticipate calling the
16 afternoon session before 2:30.

17 So you are welcome to stay here
18 and listen to us deliberate or you can make
19 schedule provisions on that, grab some lunch,
20 if you will, or whatever it is, utilize the
21 time. I would not -- as I say, will not call
22 the afternoon to order before 2:30.

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1 Moving back into the case now that
2 has been called for us on deliberation
3 regarding the Connecticut Avenue Klein parking
4 lot, let me open it up for comments. Well,
5 first of all, there is a long history of
6 approvals by the Board and it has been an
7 existing surface parking lot for an extensive
8 amount of time.

9 We had some comments on the
10 correct utilization based on the retail on
11 Connecticut and its relation to the parking
12 lot in back, the condition of the parking lot.
13 Let me first state no matter what and where,
14 our provisions and regulations are very strict
15 in terms of what needs to be complied with
16 when one looks at a surface parking lot from
17 wheel stops to signage to striping to the
18 surfacing to landscaping.

19 Now, oftentimes we do attach in
20 our orders conditions of those. However, it
21 is often redundant. Looking at this, I think
22 we can easily say this has, as I said, a long

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1 history of special exception review and under
2 section 213, I believe in the presentation of
3 their case that it has met all of those
4 provisions.

5 Let me open it up if there are
6 comments from others.

7 VICE CHAIR MILLER: Okay. I don't
8 know that you want to go through each one, but
9 certainly 213.5 was an important one, that
10 there would be no dangerous or otherwise
11 objectionable traffic conditions resulting
12 from the establishment of the use and the
13 present character and future development of
14 the neighborhood will not be affected
15 adversely.

16 And I think that's an issue with
17 respect to when we start looking at the
18 conditions, I mean, yes, that are proposed and
19 I think it's important to note that Office of
20 Planning stated that the Department of
21 Transportation did not find any adverse
22 impacts on traffic.

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1 That is something that could have
2 changed from the previous order, but did not
3 to any degree to give concern to DDOT.

4 CHAIRPERSON GRIFFIS: Excellent.
5 Make your motion. Was there a motion?

6 VICE CHAIR MILLER: Mr. Chairman,
7 I could move a motion and then we could
8 discuss conditions under it.

9 CHAIRPERSON GRIFFIS: Yes.

10 VICE CHAIR MILLER: And that would
11 be to approve the application of John R.
12 Klein, No. 17527, for a special exception to
13 continue the use of accessory parking lot
14 under sections 213 and 2303.

15 BOARD MEMBER MANN: Second.

16 CHAIRPERSON GRIFFIS: Thank you.
17 Let's move right ahead as you want to
18 condition this, if I'm not mistaken. We have
19 -- pardon me.

20 I think the critical piece is to
21 have all the information in front of me. No,
22 is to look at -- we have the Office of

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1 Planning, of course, was addressing all the
2 conditions that were regulating this. The ANC
3 also proffered conditions and then we have the
4 original order or not the -- the existing
5 order of 2001, which the Board looked at.

6 And what I would like to do is
7 address each of these down and then address if
8 the Office of Planning or, critically, the ANC
9 differentiates themselves from either of these
10 conditions or address these conditions, I
11 think we can do this very quickly and we'll
12 just take them one at a time.

13 The first, I think, is the most
14 critical, is the approval period. I would
15 note that in asserting an approval period, we
16 have, what is it, five years from OP, one year
17 from the ANC, and we have the original first
18 order of this issued in 1961. I think that's
19 when they invented blacktop and they put it
20 down on this parking lot. That's a joke, of
21 course.

22 But the point being this has been

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1 in existence for an incredible amount of time.
2 The element of our special exception review
3 and specifically under 213 is to review the
4 placement of these and any adverse elements
5 out of all the criteria that we look at that
6 are created by having the parking lot in this
7 area.

8 You know, the location within 200
9 feet of existing commercial or industrial
10 area, contiguous to an alley or commercial
11 district, no dangerous or otherwise
12 objectionable traffic conditions resulting,
13 reasonably and necessary, convenient, a lot of
14 it is almost going directly to the
15 establishment of it.

16 Now, certainly, there is
17 utilization and continued operation of it, but
18 nothing to date and even reading the old
19 orders and in the case presentation at this
20 time, nothing is persuasive that fundamentally
21 these things, you know, traffic conditions or
22 fundamentally the big picture items are going

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1 to change that might necessitate us reviewing
2 again in a close period this application.

3 Now, that doesn't mean that they
4 wouldn't have to keep it clean and clear,
5 maintain stripes, surfaced and landscaped.
6 That is in our requirements just by having it,
7 by having a special exception review. So I
8 would support discussion on the time period
9 placed on this, and I would begin that
10 discussion at 10 years.

11 BOARD MEMBER MANN: Mr. Chairman,
12 I would actually be in favor of removing any
13 time limitations on that given the very long
14 history of use of the parking lot and by the
15 fact that you have said that any of those
16 other elements that need to be addressed or
17 enforced can and will be, and I don't think
18 that there is any need for us to act as the
19 enforcement body on that every couple of years
20 or 5 years or 10 years.

21 CHAIRPERSON GRIFFIS: That's an
22 interesting point. Yes, Ms. Miller?

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1 VICE CHAIR MILLER: I wouldn't
2 take that position. I think that there is
3 validity to the fact that this parking lot has
4 been there for a long time and its use has
5 been determined to be essential by Office of
6 Planning and the neighborhood is certainly not
7 opposed to it, but we did have some concern by
8 the ANC and the community about problems with
9 the lot with the overcrowding or traffic
10 problems, so that I think that it should come
11 back to us for some review at some point.

12 The Office of Planning suggested
13 five years. I would go with somewhere between
14 5 and 10 then. I wouldn't go no review. I
15 guess, I mean, it's a number here, but I would
16 be inclined to accept Office of Planning's
17 suggestion of five, but I wouldn't be opposed
18 to seven or something like that.

19 CHAIRPERSON GRIFFIS: Okay.

20 VICE CHAIR MILLER: You know, if
21 we feel like we need to not burden the owner
22 in coming back too soon. I do think that the

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1 one year suggested by the ANC is really not
2 called for. I don't think that we're finding
3 there are adverse impacts.

4 It has a long history and they
5 would just have to like go back and turn
6 around and prepare their next step application
7 after this, so I think that is not called for
8 certainly.

9 CHAIRPERSON GRIFFIS: Okay. So
10 what we have here is the -- I think it's
11 legally defined as the Goldilocks Theory, 5,
12 10 and infinity. Okay. Good. Mr. Mann,
13 let's hear from you. I would -- 5 years seems
14 to be a short turnaround to me.

15 I mean, if you look at the
16 procedure, conceivably just for a special
17 exception, and let's generalize it and round
18 off, but it's probably a year to get prepared
19 to get on the schedule to proceed and then
20 have an order issues. So, basically, looking
21 to turn around and have a couple of years of
22 existence and then right back in, 10 years

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1 seems to be much more accommodating. It's
2 something that existed for over 40 years, so--

3 VICE CHAIR MILLER: I think I
4 could go with 10 years. I mean, as we go
5 through these conditions, you know, I can see
6 if there seems to be a problem, but if we have
7 specific conditions with which they are
8 supposed to comply, if they are not in
9 compliance, they can bring an enforcement
10 issue.

11 CHAIRPERSON GRIFFIS: Absolutely,
12 yes, absolutely.

13 VICE CHAIR MILLER: So I'm not
14 sure that we -- you know, some of these terms
15 means you come and you look at it again to
16 see. You know, maybe new conditions might be
17 required or something and I think I would tend
18 to say that that's unlikely in this case,
19 given it has a long history.

20 CHAIRPERSON GRIFFIS: Right. The
21 only provision, and I tend to agree with Mr.
22 Mann, but it's somewhat persuasive to have

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1 some control over it, because as it is located
2 in R-1 District, in R-1-B, that perhaps within
3 the next couple of decades there may be
4 substantial change of some sort that would
5 necessitate re-look at this.

6 I can't project out or
7 hypothesize. It seems like this is -- and it
8 has clearly, clearly been evidenced to be a
9 critical element of providing parking for the
10 retail along Connecticut, but maintaining a
11 review and a public review may make some
12 logical sense.

13 Mr. Mann, are you of interest to
14 discuss 10 years or another year provision?

15 BOARD MEMBER MANN: Well, let me
16 say this. I wouldn't vote to deny this
17 application based on the fact that you didn't
18 accept my suggestion for no time limit.

19 CHAIRPERSON GRIFFIS: Okay. Then
20 why don't we, in order to proceed in this for
21 the sake of discussion and deliberation on
22 this, note Condition 1 as approval for a

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1 period of 10 years. Okay. We also had noted
2 that 19 parking spaces would be provided on
3 the site.

4 There was some talk of 13 being
5 dedicated towards Zips Dry Cleaning Service.
6 That seems to be a very limiting condition in
7 an order if we were to put it in. I noted in
8 the Public Hearing that they indicated that
9 those were leased and utilized by Zips, but if
10 -- that would be a provision if we
11 specifically -- what would happen if Zips
12 decided to move?

13 VICE CHAIR MILLER: Right.

14 CHAIRPERSON GRIFFIS: I think the
15 provision of those 19 is the critical aspect.
16 Do you agree?

17 VICE CHAIR MILLER: I totally
18 agree.

19 CHAIRPERSON GRIFFIS: Okay. The
20 hours of operation. This was another existing
21 condition that we had in the previous order.
22 I wasn't -- if you recall, there was some note

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1 of there is no real provision of closing this
2 off necessarily. The hours of operation were
3 of their operation or their maintenance
4 overview and control of the parking lot.

5 We have had this before in terms
6 of programmed parking and our provisions, I
7 think, are a little antiquated when we address
8 these, but we have actually had cases where we
9 require them to chain it off and not use it.
10 It makes, you know, logical sense if, you
11 know, parking is such a critical issue.

12 My point being, I guess, directly
13 is are we needing to condition or what is the
14 fact base or potential adverse impact that
15 we're looking to regulate by providing an hour
16 of operation for the parking? Go ahead.

17 VICE CHAIR MILLER: I think it's
18 that the parking lot abuts a residential area
19 and where this goes to preventing noise and
20 traffic that would disturb the neighbors
21 before and after the hours that are designated
22 here.

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1 So as I understand it, it means
2 that this applicant would not be operating its
3 parking lot for the businesses that are there,
4 but I think what you're saying is it might not
5 go to whether or not a car could just come in
6 there and park before or afterwards.

7 CHAIRPERSON GRIFFIS: Yes. And I
8 guess in some respects, I want them to
9 maintain responsibility to control that
10 parking lot all the time, whenever, you know,
11 unless they -- and they -- you know, hours of
12 operation for a surface parking lot. If they
13 decided that they don't want to have control
14 over it, then they can close it off somehow
15 and that's up to them.

16 But I don't -- the residential
17 impact, there is no evidence in the record
18 that shows that. In fact, there is a huge
19 buffer that is landscaped in the residential
20 as fairly far removed. I just didn't see --
21 I don't -- I fundamentally don't understand
22 the reasoning behind an operation schedule for

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1 this.

2 VICE CHAIR MILLER: Well, it's
3 funny. I mean, I had the impression that it
4 did go to, you know, preventing noise for the
5 benefit of the abutting residential area, and
6 I think so does the landscaping. I mean, all
7 that goes to that. This is one of those
8 items, I think, that could -- it could be in
9 the body of the order that that's what their
10 hours of operation are.

11 CHAIRPERSON GRIFFIS: I think
12 that's fine, if we listed a finding of fact or
13 of some nature.

14 VICE CHAIR MILLER: Um-hum.

15 CHAIRPERSON GRIFFIS: I mean, it
16 was actually in the past. I mean, even Office
17 of Planning when they address this condition,
18 they address it by saying all the businesses
19 which the parking lot serves operate sometime
20 between the hours of 7:00 a.m. and 8:00 p.m.
21 Mondays to Fridays. So it's almost like,
22 well, that's fine.

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1 So is it tied to the operation of
2 the retail, but still, what is the impact that
3 we're trying to regulate here?

4 VICE CHAIR MILLER: I think it
5 also goes to how would it be enforced and if
6 a condition can't be enforced, then what good
7 is it as a condition?

8 CHAIRPERSON GRIFFIS: Yes. And if
9 it is enforced, does it make sense to have an
10 empty parking lot at 9:00 at night in an area,
11 you know? Maybe a restaurant goes in and they
12 serve dinner until 11:00. It doesn't make any
13 sense to me. I would not advocate keeping it
14 in unless there is any objection to that.

15 VICE CHAIR MILLER: No. I would
16 just say if it's -- we take it out, we ought
17 to just reflect in the body of the order that
18 those are the hours of operation.

19 CHAIRPERSON GRIFFIS: Excellent.

20 VICE CHAIR MILLER: Okay.

21 CHAIRPERSON GRIFFIS: I mean, I
22 would like the comments that Office of

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1 Planning in their analysis look to in that
2 condition. The area devoted to driveways
3 access and parking area should be maintained
4 with paving material forming all weather
5 impervious surface. I mean, that's fine to
6 keep in.

7 It's actually a requirement in our
8 regulations, is wheel stops shall remain
9 installed. The lot shall be kept free of
10 refuse and debris and shall be paved and
11 landscaped. No vehicle, therefore, or part
12 thereof shall be permitted to project over the
13 lot line or building line or public space.
14 Again, these are all redundant of the
15 requirements in our regulations. I don't have
16 any difficulty in keeping them in.

17 The garbage container/dumpster
18 shall remain at the location identified in the
19 site plan of which they have done that. It is
20 occurring. I would note that it evidences
21 itself in one of our orders, 16659, and the
22 Office of Planning had mentioned that it had

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1 moved, I guess, or was not properly on the
2 site or I forget all the detail of it, but
3 there was the need for a wheel stop or some
4 sort of device to keep it in its location.

5 I think if we just have the fact
6 of this condition, it would, therefore, be
7 complied with. The garbage container/dumpster
8 shall remain at the location identified on the
9 site plan. Obviously, that is going to be on
10 the lot.

11 VICE CHAIR MILLER: Mr. Chairman?

12 CHAIRPERSON GRIFFIS: Yep?

13 VICE CHAIR MILLER: I think I
14 could be mistaken, but I think you might be
15 reading a proposed ANC condition, as opposed
16 to Office of Planning's condition.

17 I think Office of Planning says
18 the garbage container/dumpster shall not be
19 permitted to project over any lot or building
20 line or on or over the public space. I'm
21 reading this from the first page of the Office
22 of Planning's report.

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1 CHAIRPERSON GRIFFIS: Right,
2 Office of Planning's.

3 VICE CHAIR MILLER: Oh, right, but
4 I thought you were reading from ANC, which
5 said garbage container/dumpster shall remain
6 at the location as identified on the site plan
7 submitted with BZA Order 16659.

8 CHAIRPERSON GRIFFIS: Right, I'm
9 sorry. I was kind of cobbling them both
10 together.

11 VICE CHAIR MILLER: Okay.

12 CHAIRPERSON GRIFFIS: Because it
13 addresses. I mean, each of them are
14 addressing --

15 VICE CHAIR MILLER: The garbage.

16 CHAIRPERSON GRIFFIS: And then --

17 VICE CHAIR MILLER: Yes.

18 CHAIRPERSON GRIFFIS: Because of
19 the Office of Planning or the ANC is saying,
20 look, keep it where it's supposed to be, but
21 the Office of Planning is saying it should be
22 kept where it is, but it's not in

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1 functionality being maintained there. So they
2 have just suggested the specific condition,
3 the existing condition I should say.

4 All in all, it goes to Condition
5 No. 8, the garbage container/dumpster shall
6 remain in the location identified on the site
7 plan, which moves us to 9, landscaping shall
8 be provided as identified in the landscape
9 proposal dated February 13, 2001 contained in
10 Exhibit 29.

11 Now, this is the old conditions,
12 so all of that doesn't have pertinence in
13 terms of exhibit. How do we want to deal with
14 landscape? There was some discussion of
15 landscape indicating --

16 VICE CHAIR MILLER: We have a
17 landscape, 2006 landscape maintenance proposal
18 that was attached to the Office of Planning's
19 report.

20 CHAIRPERSON GRIFFIS: Right.

21 VICE CHAIR MILLER: Do we want to
22 cite that?

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1 CHAIRPERSON GRIFFIS: This one?
2 Which one was that? I think we can maintain
3 it and take out the Exhibit 29 and just say as
4 dated February 13, 2001, because I'm assuming
5 that that which is attached to the Office of
6 Planning is from that previous order and that
7 shows the landscaping area, but it also shows
8 the revision, so I think it would be a good
9 attachment as part of this.

10 And, of course, that landscaping
11 will be maintained in a healthy growing
12 condition, in a neat and orderly appearance.

13 VICE CHAIR MILLER: Do you have a
14 copy of that, February 13, 2001 proposal?

15 CHAIRPERSON GRIFFIS: Yes. No.

16 VICE CHAIR MILLER: No.

17 CHAIRPERSON GRIFFIS: Huh?

18 VICE CHAIR MILLER: Well, there is
19 a 2006 proposal, so I'm just -- I'm wondering
20 how that relates. I would think that would be
21 relevant to their maintenance.

22 CHAIRPERSON GRIFFIS: The 2006, do

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1 you mean the submission of the landscaping
2 contract or the diagram?

3 VICE CHAIR MILLER: The contract
4 which says what they are going to do. Now, if
5 we're putting this for a 10 year period, I'm
6 not sure whether something like that might
7 change.

8 CHAIRPERSON GRIFFIS: But there's
9 two different pieces. The landscape
10 maintenance proposal that you're looking at
11 was looking at how and when they come in to
12 clean up the leaves and just the leaves and do
13 annual stuff. The other piece is showing the
14 diagram of where that landscaping is to go.

15 So one is fundamentally how you
16 address the site. The other is how they
17 maintain it, and then the cleaning and all
18 that is done totally separately.

19 VICE CHAIR MILLER: Okay. So,
20 basically, the 2006 landscape maintenance
21 proposal is just evidence that was submitted
22 in the record that goes to their requirement

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1 to maintain it in a healthy growing condition
2 and in a neat and orderly appearance?

3 CHAIRPERSON GRIFFIS: Right.

4 VICE CHAIR MILLER: Okay.

5 CHAIRPERSON GRIFFIS: And then the
6 -- I would say the Condition 11, I believe, no
7 other use shall be conducted from upon the
8 premises, no structures other than such as
9 will be directed to use the premises unless
10 the use is residential. I'm sure that will
11 come out right on the transcript, right?

12 It's Condition 11 from our
13 previous order that is directly from our
14 regulations, and I think it's appropriate to
15 put in as it has been in the previous orders,
16 rather than address why we have removed it.

17 Condition 12, any lighting used to
18 illuminate the parking lot or its accessory
19 buildings shall be so arranged that all the
20 direct rays of the light, lighting to be
21 confined to the surface parking lot, also a
22 provision in our regulations, also none of the

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1 lighting, rather.

2 To say it properly in English,
3 there is no lighting provided on this site.
4 However, if they were to propose to do so, we
5 might as we have it in and it is from the
6 previous order and its condition.

7 Let me look at any other. There
8 was a provision of signage also from the ANC.
9 Their Condition 13, all signage to the parking
10 lot shall be maintained and damaged and bent
11 signs shall be repaired and/or replaced on at
12 least a quarterly basis.

13 I would like to add that to
14 Condition No. 6. All parts of the lot shall
15 be kept free of refuse and debris and shall be
16 paved and landscaped. All signage at the
17 parking lot shall be maintained, undamaged or
18 just maintained. I guess we'll put a
19 provision of language that says in, you know,
20 a proper condition for however we want to
21 write it.

22 I don't care. Let's just add this

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1 in, and damaged and bent signs shall be
2 repaired or replaced. Quarterly basis,
3 putting a timing into it doesn't make any
4 sense. We want it done right away. Okay. So
5 when it happens, it needs to be corrected.

6 I think we have addressed
7 everything else in this and we have brought up
8 a little bit of the traffic coordinator or do
9 we discuss traffic coordinator a little bit?
10 One of the elements, of course, in the other
11 aspects of this area and in our review and not
12 our review is this provision.

13 Nothing in this hearing was
14 persuasive enough in my mind to bring forth a
15 required condition of having some traffic
16 engineer, rather traffic coordinator,
17 directing or addressing inflow or egress or
18 patterns of use from Connecticut or in the
19 alley, and so I would not be amenable to
20 adding a condition of that to this. Others?

21 VICE CHAIR MILLER: This case was
22 unusual in that it is related to another

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1 parking lot case that we had in which there
2 was or we did order that there be a traffic
3 coordinator on this lot for, I think it was,
4 a period of like a year and a half until the
5 Board was going to consider this application.

6 And so when we explored that at
7 the hearing, there wasn't any evidence that
8 that was successful in ameliorating any kind
9 of traffic or parking problems.

10 So for me that was the biggest
11 reason not to do it and that, in fact, there
12 were other problems that were raised at our
13 hearing with respect to a traffic coordinator,
14 with respect to their authority, where they
15 would be and some patrons finding the traffic
16 coordinator helpful, some patrons finding the
17 traffic coordinator annoying or whatever. It
18 just didn't address any adverse impacts.

19 So I think we had actually
20 evidence, a trial history here, and it didn't
21 support adding that kind of a condition, which
22 is a pretty drastic condition. I don't think

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1 we have it in any parking lot case. So I
2 would not include it in this one.

3 CHAIRPERSON GRIFFIS: Right. It
4 also brought up some interesting discussion
5 on, one, the authority of a traffic
6 coordinator to actually implement anything,
7 which there is none, and then the liability
8 that might come up from having that traffic
9 coordinator.

10 As I recall, not going into the
11 details of the other case, but it seems to me
12 that we looked at this traffic coordinator as
13 more as an education provider of opportunities
14 for parking, to be on Connecticut Avenue and
15 asking, you know, please, don't stop when
16 there is, you know, no parking allowed or, you
17 know, there is provisional parking in the
18 rear, etcetera.

19 But I totally agree with the
20 aspect of the fact that we have real history
21 showing the utilization of it and it has not,
22 obviously, been conditioned in this order.

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1 VICE CHAIR MILLER: Okay.

2 CHAIRPERSON GRIFFIS: Anything
3 else then?

4 VICE CHAIR MILLER: I just want to
5 clarify since we have been referencing the
6 history here that in the other case, the only
7 reason that I think the Board even considered
8 putting it in as a condition was because both
9 parties suggested it.

10 CHAIRPERSON GRIFFIS: Right.

11 VICE CHAIR MILLER: So we thought,
12 okay, well, let's see if it works. It's only
13 going to be on a trial period and it doesn't
14 look like it worked.

15 CHAIRPERSON GRIFFIS: Indeed. It
16 shows that sometimes we need to use our own
17 judgment even when all in front of us say we
18 should do it. Okay. Interesting point.
19 Anything else then?

20 VICE CHAIR MILLER: I think there
21 might be one more ANC condition that we didn't
22 address, I'm not sure if you did or not, with

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1 respect to trash, that they have a proposed
2 condition. Trash and other debris is
3 collected on a daily basis and placed inside
4 a dumpster with a lid that is kept closed.

5 Did you address that? I know you
6 addressed location of the dumpster.

7 CHAIRPERSON GRIFFIS: I didn't
8 because it's required to be free and clear of
9 debris. And there was testimony in the record
10 by the applicant that they have someone every
11 day picking up. I mean, if you feel that we
12 need to be even more definitive on that?

13 VICE CHAIR MILLER: I don't feel
14 we need to be more definitive, no.

15 CHAIRPERSON GRIFFIS: Okay.

16 VICE CHAIR MILLER: I just thought
17 we might need to address it and that's what
18 you did, that it's not necessary since we have
19 something in there that says that be kept free
20 of debris. Do we?

21 CHAIRPERSON GRIFFIS: Condition 6,
22 all parts of the lot shall be kept free of

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1 refuse and debris and shall be paved and
2 landscaped. And then we have added in
3 addition to that the signage and maintenance
4 on that. I mean, the elements of that, I
5 mean, would have to be -- you know, when we go
6 to even more definitive elements and
7 specificity, we ought to -- this ought to be
8 some differentiation between this particular
9 application and others that, you know, move
10 beyond the regulation.

11 So that being said, anything else
12 then? Okay. Anything else on this then? If
13 there's nothing further, it is my recollection
14 that we have a motion. It has been seconded
15 and it has now been conditioned. If there is
16 nothing further, then let me ask for all those
17 in favor of the motion to signify by saying
18 aye.

19 ALL: Aye.

20 CHAIRPERSON GRIFFIS: And opposed?
21 Abstaining? Mr. Moy, when you get a chance.

22 MR. MOY: Yes, sir. Staff would

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1 record the vote as 3-0-1. This is on the
2 motion of the Vice Chair, Ms. Miller, to
3 approve the application with conditions as
4 stated, seconded by Mr. Mann. Also in support
5 of the motion Mr. Griffis. We have Mr.
6 Etherly not present and not voting.

7 We also have an absentee ballot
8 from Mr. Turnbull and his vote is to approve
9 the application. His comments read as
10 follows: "Approve for a period of 10 years,
11 which is consistent with the Board's
12 conditions, or as the majority of the vote
13 recommends." So that would -- should give a
14 resulting vote of 4-0-1.

15 CHAIRPERSON GRIFFIS: Excellent.
16 Thank you very much, Mr. Moy. I don't see any
17 reason why we wouldn't waive our rules and
18 regulations unless there are any objections
19 from the Board, we could issue a summary order
20 on this. Not noting any objections, why don't
21 we do that? Very well.

22 It is my great pleasure to welcome

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1 Mr. Hood with us.

2 COMMISSIONER HOOD: Is it
3 afternoon?

4 CHAIRPERSON GRIFFIS: Yes.

5 COMMISSIONER HOOD: Good
6 afternoon.

7 CHAIRPERSON GRIFFIS: And that's
8 the only detriment to have to say good
9 afternoon, as we're still in our morning
10 session, but this will be the last. We
11 appreciate Mr. Hood's presence with us today.
12 Mr. Moy, if you wouldn't mind calling the next
13 case for our consideration?

14 MR. MOY: Yes, sir. This is the,
15 as you stated, Motion for Reconsideration of
16 Application No. 17512 of KC Enterprises. This
17 is pursuant to section 3126 of the Zoning
18 Regulations. The original application was
19 pursuant to 11 DCMR 3103.2, for a variance
20 from the lot area and lot width requirements
21 under section 401, and a variance from the
22 side yard requirements under section 405, to

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1 construct a new semi-detached dwelling in the
2 R-2 District at premises the east side of the
3 500 Block of 58th Street, N.E., and that's in
4 Square 5265, Lot 22.

5 On October 13, 2006, Albert and
6 Melissa Mohammed filed a motion for
7 reconsideration of the Board's decision and
8 that filing is in your case folders identified
9 as Exhibit 33. In response, the Office has
10 also received two filings to the motion. One
11 is a letter in opposition from Kevin Moody of
12 KC Enterprises, dated October 24, 2006, and
13 this is identified as Exhibit 34.

14 And finally, also a letter in
15 opposition from Normal and Alicia Porter, the
16 property owners, and this is identified in
17 your case folders as Exhibit 35. The Board is
18 to act on the relevant provisions of section
19 3126 and especially section 3126.2 and 3126.5.

20 The two preliminary matters for
21 the Board's consideration is the status of the
22 motion and, as I said, pursuant to 3126.2 and

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1 subsequent to that the letters in response in
2 terms of their timeliness pursuant to section
3 3126.5. And that completes the staff's
4 briefing, Mr. Chairman.

5 CHAIRPERSON GRIFFIS: Excellent.
6 Thank you very much, Mr. Moy. Let's get right
7 into this. And clearly, for a motion of
8 reconsideration, we need to look at several
9 things. We will go through exactly those
10 provisions. But we look to whether we made a
11 fundamental error that we need to readdress
12 and we also look to whether there was new
13 evidence that was brought forth that was not
14 able to be brought forth in the proceedings
15 and in the Public Hearing.

16 Yes, go ahead.

17 VICE CHAIR MILLER: Mr. Chairman,
18 I would suggest that even before we look at
19 that we look at whether or not the motion for
20 reconsideration is properly before us.

21 CHAIRPERSON GRIFFIS: Okay.

22 VICE CHAIR MILLER: And

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1 reconsideration regulations are set forth at
2 3126 of our regulations. And 3126.2 says that
3 "Any party may file a motion for
4 reconsideration." And the movement in this
5 case was not a party to the proceeding and,
6 therefore, I don't believe has standing to
7 file a motion for reconsideration. So I would
8 move to dismiss the motion for reconsideration
9 on grounds that the movement lack standing
10 before the Board to move for reconsideration.

11 CHAIRPERSON GRIFFIS: Very well.
12 Is there a second?

13 BOARD MEMBER MANN: Second.

14 COMMISSIONER HOOD: Second and
15 just a question. Ms. Miller and I were on the
16 opposing side. Can she do that? Is that
17 legal? Legal, sufficiently, can you do that?

18 VICE CHAIR MILLER: Yes.

19 COMMISSIONER HOOD: Okay.

20 VICE CHAIR MILLER: Oh, I'm sorry.
21 But if you're asking my opinion, you can.

22 COMMISSIONER HOOD: I was just

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1 asking.

2 VICE CHAIR MILLER: We're not
3 moving for reconsideration.

4 COMMISSIONER HOOD: So we make
5 sure procedurally.

6 CHAIRPERSON GRIFFIS: Judge, Jury,
7 execution.

8 COMMISSIONER HOOD: Actually, yes.
9 I'm just making sure.

10 CHAIRPERSON GRIFFIS: It's your
11 opinion.

12 VICE CHAIR MILLER: If you want
13 the Office of Attorney General to state --

14 COMMISSIONER HOOD: No, that's
15 fine.

16 CHAIRPERSON GRIFFIS: Yes.

17 COMMISSIONER HOOD: Okay.

18 CHAIRPERSON GRIFFIS: I think it's
19 an excellent clarification in terms of we had
20 a split vote on that, sort of a
21 differentiation of votes. I think Mr. Hood
22 brings up an excellent question and it is my

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1 opinion also, but unless that's contrary, you
2 can tell us. Obviously, this is now a new
3 motion, the substance of which is based
4 directly on it. Go ahead, Ms. Miller.

5 VICE CHAIR MILLER: I did also
6 want to make this comment though that even
7 though an individual cannot, under our rules,
8 move for reconsideration, that we said this in
9 reference to an earlier case today that they
10 do have standing before the Court of Appeals
11 to appeal the decision to the Court of
12 Appeals, if they are, you know, impacted by
13 the decision.

14 So it does not preclude them from
15 appealing, but according to our rules, the way
16 I interpret it and what my motion is based on,
17 is that they don't have standing before us to
18 move for reconsideration.

19 CHAIRPERSON GRIFFIS: Excellent.
20 So we do have that before us. It has been
21 seconded. Is there discussion on that?
22 Additional deliberation? I think that is

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1 absolutely the proper motion and it is
2 absolutely the substance and jurisdiction of
3 which the Board should take this up.

4 However, now that I have a quick
5 30 seconds, I also want to go to, although
6 it's not necessarily appropriate, a statement
7 to the fact of even if we were to move this
8 in, the substance of which, I feel having read
9 it were all addressed and the proper
10 opportunity, whether a party or a person, was
11 availed to all the participants in this case.
12 And in fact, all of those elements were
13 directly picked up, discussed, deliberated and
14 addressed by the court.

15 But that being said, we do have a
16 motion before us to deny the motion for
17 reconsideration. I'm sorry. Dismiss the
18 motion for reconsideration and it has been
19 seconded. If there is no further deliberation
20 on that, I would ask for all those in favor to
21 signify by saying aye.

22 ALL: Aye.

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1 CHAIRPERSON GRIFFIS: And opposed?
2 Abstaining? Mr. Moy?

3 MR. MOY: Yes, sir. The staff
4 would record the vote as 4-0-0. This is on
5 the motion of Ms. Miller to -- on her motion
6 to dismiss the motion for reconsideration,
7 seconded by Mr. Mann. Also in support of the
8 motion is Mr. Griffis and Mr. --

9 COMMISSIONER HOOD: Hood.

10 MR. MOY: -- Hood. Thank you.
11 Finally, sir, we also have an absentee ballot
12 from Mr. Etherly, who participated on this, on
13 the original application, and although he is
14 not here to vote on the motion of the Vice
15 Chair to dismiss, his absentee ballot, and
16 I'll just record for the record, was to grant
17 the motion for reconsideration. So I have to
18 give a final vote of 4-0-1 on this motion to
19 dismiss, correct?

20 CHAIRPERSON GRIFFIS: Excellent.
21 Thank you very much, Mr. Moy. I appreciate
22 you recording the vote in that fashion. Is

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1 there any other business for the Board in the
2 morning session in the Public Meeting?

3 MR. MOY: No, sir. Can we do a
4 summary order on this?

5 CHAIRPERSON GRIFFIS: I believe
6 so, yes.

7 MR. MOY: All right. Very good.

8 CHAIRPERSON GRIFFIS: I don't see
9 any reason why we would do a full order. We
10 can issue a summary order on this. Excellent.
11 If there is nothing further then, let's
12 adjourn the morning session. That being said,
13 it's 1:50. We're going to take a very --
14 we're going to take a lunch break. I will
15 call the afternoon hearings at 2:45. Thank
16 you all very much.

17 (Whereupon, at 1:53 p.m. the
18 Public Meeting was concluded.)

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